114-654

Office Supreme Court U. S.
FILED.
JAN 29 1885
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1884.

No. 283.

THE CANAL AND CLAIBORNE STREETS RAILROAD COMPANY, GARNISHEES, IN THE SUIT OF JUDAH HART *vs.* THE CITY OF NEW ORLEANS,
PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Brief of Plaintiff in Error.

J. R. BECKWITH,
Counsel for Plaintiff in Error.

J. S. Rivers, Stationer and Printer, 74 Camp St., N. O.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1884.

No. 283.

THE CANAL AND CLAIBORNE STREETS RAILROAD COMPANY, GARNISHEES, IN THE SUIT OF JUDAH HART *vs.* THE CITY OF NEW ORLEANS,
PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

Brief of Plaintiff in Error.

Statement of Facts.

It is not probable that the present century will furnish a more marked instance of flagrant abuse of the third subdivision of article 639 of the Revised Statutes, than is presented and disclosed in the record and proceedings in this cause.

In 1874 to check the extravagance of the government of the city of New Orleans, the State, in due form, adopted an amendment to its constitution as follows:

"The city of New Orleans shall not hereafter increase her "debt in any manner or form, or under any pretext; and after "the 1st of January, 1875, no evidence of indebtedness or "warrant for the payment of money shall be issued by any "officer of said city, except against cash actually in the treas-"ury."

The same amendment denounced a penalty of imprisonment of not less than two or more than ten years, and fine not less than three or more than ten thousand dollars. *Session Laws of* 1874, *page* 56.

In the case of the *New Orleans Tax-Payers' Association vs. the City of New Orleans*, 33 *A.* 567, the Supreme Court of the State declared this amendment operative from the 2d of November, 1874, until the adoption of the present new constitution, on January 1st, 1880, and adjudged that it operated upon all parties dealing with the city of New Orleans; that every person dealing with the city was bound by its condition, and could get no obligation from the city beyond a claim on the revenues of the current year during which they were dealing with the city; that the city could not issue any evidence of indebtedness or warrant not drawn "against cash actually in the treasury." When strenuously pressed, on application for rehearing, to change their ruling, the court affirmed the same in all particulars.

Therefore, at and before the time of the institution of this suit, the settled law of the State was, that all pretended ordinances and appropriations referred to in the plaintiff's petition (record, page 4, *et seq.*) were void, and could not be merged in any general judgment against the city; that all of the pretended ordinances, between November 2d, 1874, and January 1st, 1880, were void, and that all warranting under them, except against actual funds, *was a felony.*

This being the declared law of the State, Judah Hart (if he be the real party in interest), claiming to be a citizen of the State of New York, claims to have gathered up a lot of ordinances, adopted during the interdicted period, alleging that they had been transferred to him by the parties named in the ordinances, together with "*their right to obtain payment of the same.*"

He was unable to find any original jurisdiction in any fed-

eral court for a suit, contemplated by him, based on the tainted ordinances, because his trash, whatever merit he might claim for it, could not be classed either as "promissory notes, negotiable under the law merchant," or "bills of exchange," under the jurisdiction act of March 3d, 1875. He therefore invited cunning to his aid, and, on the 4th day of November, 1881, filed the petition, set forth on page 2 of the printed record, in the Civil District Court for the parish of Orleans. On the same day citation was served on the city, and on the same day Hart filed in the State court a petition for removal (record, page 22) to the federal court under the "local prejudice" clause of article 639, R. S.

In his petition he referred to the article by simple reference to its number and the third sub-division thereof. The petition contained no averment of belief or reason for belief in any prejudice or local influence, but simply refers to some affidavit alleged to be filed with the petition. An alleged affidavit (record, page 22) purporting to have been made before one George R. Jaques, "Commissioner of Deeds of Louisiana," No. 252 Broadway, New York, sworn to on the 25th day of October, 1881,—ten days before this suit was instituted or had any existence, and ten days before any judicial action was had in this controversy in any court; that is, he filed in the State court an affidavit made *ten days before his suit had any existence*, that he believed, and had reason to believe, prejudice and local influence existed in Louisiana to such extent as to injure or imperil his rights. Upon this showing and a bond the court made an order declaring the case removed to the Federal Court for the Eastern District of Louisiana, at its November term, 1881 (record, page 23). So far all was triumph.

The next term of the federal court commenced on the 7th of November, 1881. Hart, on that day, went in the federal court, and on the *ex parte* representation of counsel obtained an enlargement of the time to file the transcript until the 14th of

November, 1881 (record, page 1). The transcript appears, however, to have been filed on the 7th of November, 1882, but this is doubtless one of the numberless blunders occurring all through the printed record. Probably the filing was November 7th, 1881. A motion to remand was made and failed. A trial of some sort was had in the federal court, resulting in a verdict against the city for $121,697.18. This result was reached on February 16th, 1882. An unavailing motion for a new trial followed the verdict. Then came a queer paper, said to be "in the nature of a remittitur," which, when added to the general judgment upon the verdict, makes one of the most singular and unique judgments ever rendered in a court of law. The effect, apparently, is to render the judgment *less* than a general judgment (record, page 34).

In substance it is decreed that, by reason of plaintiff's consent "in the nature of remittitur," *for the purpose of avoiding a question arising on the motion for a new trial*—

> "That in case the plaintiff shall hereafter apply for a mand-
> "amus to compel the levy of taxes to pay amount herein de-
> "creed, or any part thereof, he shall be bound by all of the
> "limitations, if any, as to the extent of the taxing power of
> "said defendant, which were in force at the time the contracts
> "herein sued upon were made between the city and the trans-
> "ferrers of the plaintiff, viz.: that the plaintiff shall not have
> "the right to compel the levy and collection of taxes in any one
> "year at a greater rate than that which was binding upon the
> "defendant at the time said contracts were made."

On the 14th of March the city of New Orleans sued out a writ of error to reverse this judgment, with a bond for costs, not operating as a supersedeas (record, page 69).

Hart, the plaintiff in the court below, then began a general onslaught on the city, in order to avoid any resort to a mandamus, in an endeavor to make the money named in the judgment on execution.

On the 14th March, 1882, Hart came into the Circuit Court and filed what he termed *a supplemental petition* in his cause,

to be found on page 37 of the record. This petition is entitled, in the cause of Hart vs. The City of New Orleans, and recites that the plaintiff has a judgment for $121,627,18; that he has issued a writ of *fi. fa.*, and having reason to believe that the Canal and Claiborne Streets Railroad Company, the Orleans Railroad Company, and the New Orleans Sugar Shed Company, corporations organized under the laws of the State of Louisiana, third persons, are indebted to the defendant in execution, or have property or effects in possession or under control belonging to said defendant, or are indebted to said defendant in execution, that petitioner has caused a seizure to be made in the hands of said persons, and prays that the Canal and Claiborne Streets Railroad Company be cited and ordered to answer, under oath, the annexed interrogatories on facts and articles; and obtained an *ex parte* order from the court, directed to the Canal and Claiborne Streets Railroad Company, commanding it to answer the interrogatories on oath and in writing.

The Court will perceive that the city of New Orleans, the defendant in judgment and execution, *was not made a party to this supplemental proceeding or petition*, nor was it cited to answer or to be in court to hear or be bound by any judgment, which, if rendered as prayed for, had the effect to take away from her a credit and discharge a debt due, as it is alleged, from the Canal and Claiborne Streets Railroad Company to the city.

On the 29th day of March, 1882, the railroad company filed its answer to the interrogatories on the facts and articles, as follows (record, page 41):

"The Canal and Claiborne Streets Railroad Company, made "garnishee herein, now comes into court, and for answer to "the interrogatories propounded by and through its president, "E. J. Hart:

"To the first interrogatory. no, except taxes of the year "1882.

"To the second interrogatory, no, except taxes of the year "1882

"To the third interrogatory, no.

"And for a full and correct statement of the facts upon "which the above answers are made, respondent, further an- "swering, says, that the privilege of the right of way of the "said Canal and Claiborne Streets Railroad Company was "granted for and in consideration of a bonus of two-sixteenths "of a cent per passenger, payable [monthly],* and that the "rate of fare is five cents per passenger; that the total re- "ceipts of the company from 1st March, 1870, to 15th March, "1882, are—

"For the year	1870	$ 118,515 20
" " "	1871	152,098 75
" " "	1872	144 373 05
" " "	1873	136,656 60
" " "	1874	115,635 40
" " "	1875	100,095 95
" " "	1876	96,101 60
" " "	1877	89,701 90
" " "	1878	90,205 20
" " "	1879	89,267 25
" " "	1880	95,269 45
" " "	1881	98,591 70
" " "	1882	20,889 60
		$1,347,391 65

"Your respondent further says that the receipts from the "15th March, 1872, to the 15th March, 1882, amount to the "sum of $1,046,918.

"Your respondent, further answering, says that he is in- "formed and believes that the bonus was in lieu and place of "the license; that the city could not claim both; that it has "ceased to demand the bonus, but has imposed a license on "the company, and the company has paid the same in 1880, "based on the receipts of 1879; in 1881, based on the receipts "of 1880; and in 1882, based on the receipts of 1881, viz.: "$375 each year, making in all $1,125, thereby releasing the "company from any obligation to pay any bonus for said years. "And respondent further says that he is informed and believes "that any claim for the bonus based on the receipts of pre- "ceeding years is prescribed.

*The word "monthly" in brackets, was by clerical error of the clerk of the Circuit Court, omitted in the transcript, but has since been supplied by stipulation.

"Respondent further swears that the Canal and Claiborne "Streets Railroad Company has already been garnisheed in "the suit of Myra Clark Gaines, Samuel Smith, subrogee, vs. "City of New Orleans, No. 2695 of the United States Circuit "Court, and of Charles Parsons vs. City of New Orleans, No. "8808 of same court; and that should judgments be rendered "against said company they will amount to more than the "company can in any event owe.

"Respondent further says that the company has claims "against the city of New Orleans for damages caused by over-"flows in 1869, 1871 and 1881, and against which it should "have been protected by the city; and that the amount due "for said damages exceeds any amount which would be due "for the bonus, if any was due.

"For this, and other reasons, the city has not required the bonus."

On the 30th day of March, 1882, Hart, by his counsel, came into court and filed the following extraordinary paper (record, page 42):

"On motion of E. H. Farrar and of A. G. Brice, of counsel "for plaintiff, and on suggesting to the court that the answers "of the Canal and Claiborne Streets Railroad Company and "of The New Orleans Sugar Shed Company, herein filed to "the interrogatories in garnishment propounded to them, are "false and untrue, and that they are indebted to the city of "New Orleans in much larger sums than there stated in their "said answers; and on further suggesting that this plaintiff "traverses the said answers both in law and fact—

"*It is ordered by the court that the said Canal and Claiborne "Streets Railroad Company and the said New Orleans Sugar "Shed Company do show cause, on Wednesday, the 5th day of "April*, 1882, *at* 11 *A. M., why the said interrogatories should "not be taken for confessed, and why judgment should not be ren-"dered against them for the amount of plaintiff's claim, with in-"terest and costs.*"

The court adopted this paper, and made the *scire facias* portion thereof an order of the court.

This document, while containing all manner of slashing allegations and denials in the way of recital, was and in fact is nothing but a *scire facias*, commanding the railroad company to be in court on the 5th of April, to show cause why the

interrogatories should not be taken for confessed and why *judgment should not be rendered against them for the amount of plaintiff's claim, with interest and costs.* This was the sole issue tendered to the Canal and Claiborne Streets Railroad Company or to the court.

The proceedings on the return of this *scire facias* were extraordinary. It is difficult to comprehend with what propriety or authority a jury could be intervened to determine whether answers are to be taken as confessed, and the party interrogated punished for contumacy by condemning him to pay an entire judgment, *irrespective of the fact whether he owed anything or not.* Yet a jury *was* called in to try this *scire facias* that is to say, to try whether the answers were to be taken as confessed or not. In some form this novel proceeding was crowded through with the aid of a jury, and that jury found a verdict, as they call it, in favor of plaintiff, Hart, and against the Canal and Claiborne Streets Railroad Company, for $33,684 74 with interest at the rate of five per cent. per annum on the various sums set forth in the verdict—i. e., on

$ 2,962 88	with interest at	5	per cent. from	1st July, 1870.
3,802 46	..	..	..	1st July, 1871.
3,609 62	..	..	..	1st July, 1872.
3,416 41	..	..	..	1st July, 1873.
2,890 63	..	..	..	1st July, 1874.
2,502 39	..	..	..	1st July, 1875.
2,402 54	..	..	..	1st July, 1876.
2,242 54	..	..	..	1st July, 1877.
2,255 13	..	..	..	1st July, 1878.
2,231 68	..	..	..	1st July, 1879.
2,381 73	..	..	..	1st July, 1880.
2,464 79	..	..	..	1st July, 1881.
522 24	..	..	..	1st July, 1882.
$33,684 74				

If this cause had been on trial in a suit instituted by the city of New Orleans against the plaintiff in error, the only pretense of right to interest, even if the answers were taken as confessed, and were held to disclose no defence, would rest on the statutes of Louisiana allowing statutory interest at the rate of five per cent on all liquidated sums from the date of liquidation.

Under the answer of the Canal and Claiborne Streets Railroad Company, the bonus due to the city of New Orleans, if any was due at all, was payable *monthly;* and if it is assumed that two-sixteenths of one cent *per capita* on passengers was liquidated at the end of *every month*, statutory interest could not be demanded until the *end* of each *month;* and yet the jury awarded *statutory interest*, divided the year in the middle, and charged interest on the *total supposed bonus for each year from the first of July of each year.* This is certainly a most extraordinary labor-saving system of mathematics, so palpably erroneous that it ought at least to be explained on this motion to dismiss or affirm.

The Canal and Claiborne Streets Railroad Company importuned the court for a rehearing; this was refused. They then moved in arrest of judgment upon the manifest insufficiency of the record and proceedings. This motion is set out on page 52 of the printed record, and contains the ten grounds designated by the learned counsel of the mover "ten utterly frivolous grounds."

The motion, he says, is "called a motion in arrest of judgment"—in his opinion an extraordinary and unheard of method of objection to proceedings on the ground of irregularity or nullity. This motion was refused, and, although probably unnecessary, a bill of exceptions was taken to the ruling of the court on the refusal.

The alleged judgment against the Canal and Claiborne Streets Railroad Company, as garnishee, was signed on the

ASSIGNMENT OF ERROR.

The plaintiff adheres to the assignment of error as contained in the record and insists that there is error in the record of the Circuit Court in that

1st. That the Circuit Court never acquired jurisdiction of the original suit of *Judah Hart against the City of New Orleans*, in which the alleged garnisheee proceedings were had. That the affidavit of Hart of local prejudice made ten days before the suit had any existence in the State Court is not compliance with the terms and provisions of Section 639, R. S.

2d. A lawfully issued and existing writ of *fi. fa.* is an indispensible condition precedent to garnishee proceedings against third persons after judgment under the Law of Louisiana and at the date of the supposed garnishee proceedings against plaintiff in error, no lawful writ of *fi. fa.* could issue against the city of New Orleans and there was no lawful writ of *fi fa.* in existence for that reason all of the pretended garnishee proceedings are void.

3d. That the alleged indebtedness of plaintiff in error to the city of New Orleans if an existing debt was a part and portion of the public revenues of the City and not subject to seizure or levy under any form or process for the collection of debts.

4th. That the alleged garnishee proceedings against the plaintiff in error are void for the reason that the judgment debtor was not made a party to the proceedings and is not concluded thereby, nor is the plaintiff in error protected thereby against a demand for the same alleged debt by the city of New Orleans.

5th. The supplemental petition of it had been exhibited against the proper parties does not set forth or disclose a cause of action against the plaintiff in error in that it does not show affirmitively that the alleged indebtedness of the Canal

and Claiborne Streets R. R. Co. in the city is not public property, and a part of the public revenues of the municipal corporation beyond the reach of execution or garnishee process.

6th. There was no issue of fact made by the *scire facias* or motion to take answers to interrogatories for confessed, which could lawfully go to a jury or be determined other than by a trial by the record.

7th. If the interrogatiories are taken as or for confessed as prayed for in the motion or *scire facias*, such confession would not warrant or sustain the judgment against the plaintiff in error.

8th. The judgment is on the face thereof erroneous in the allowance of interest, both as to the amount and manner of computation.

9th. The judgment is erroneous in the allowance of interest. The amount, if due to the City, had never been liquidated in such manner as to subject plaintiff in error to payment of nterest by the force of any statute of Louisiana.

ARGUMENT.

The Circuit Court never acquired jurisdiction of the suit of Judah Hart vs. the City of New Orleans, by the supposed removal proceedings. The garnishee has not only the undoubted right, but it is his actual duty to see that the pretended judgment which he is asked to pay is not on its face a nulity. This court is called on to determine whether the circuit court ever obtained jurisdiction of the cause, and determine whether it will sanction the use which has been made of section 639, R. S., in the attempted transfer of this cause to the federal court. Whether the affidavit of Judah Hart, made in New York *ten days before he had any suit in the State courts of Louisiana*, can

be made so potent as to *frank* a suit or suits to be *afterwards* brought by him; whether such an affidavit can be made to apply to a suit whose existence commenced *ten days after his swearing*, when there is nothing in the affidavit to identify it as an affidavit with this action, except the docket No. 4414, which must have been inserted *after* the affidavit was sworn to and transmitted by mail to New Orleans, as it is obvious that Hart could not swear in New York to a number on the docket of a Louisiana court in New Orleans, when that docket number at the time of his swearing had no existence, and did not exist until ten days after his New York swearing was over; and whether the third sub-division of article 639 is so elastic that a lawful removal can be made by the effect of such an affidavit of prejudice. Certain it is that if this case is an illustration of the use to which section 639 can be applied, there should be no enlargement of its range by judicial construction.

The manifest spirit and intention of the statute is that the affidavit showing local prejudice, should show such prejudice as existing at the actual time of the institution of the action, or at some period of its actual pendency in the State court. The entire sentiment of a community may become revolutionized within ten days. It is equally clear that the statute was intended to protect litigants against the prejudice of the class from which juries are drawn, and not to interfere with the construction given by State courts to state statutes, relating to strictly internal interests and matters.

If Article 639 can be resorted to to secure the transfer of causes from State Courts because litigants are dissatisfied with the construction of state statutes or provisions in the state constitution given by the highest court in the state as illustrated in this case, we have reached the time when the act should be repealed.

The federal court in its action against the plaintiff in error

must find warrant for the garnishee proceedings in the statutes of Louisiana. Unless there was an adoption of state statutes authorizing garnishee proceedings in the Federal Revised statutes of 1874, the federal court sitting in Louisiana is without jurisdiction to entertain or enforce garnishee proceedings against the city of New Orleans or any of its debtors.

The only direct or express federal legislation authorizing garnishee proceedings by federal courts is contained in Sections 935—936—937 U. S. R. S., a portion of the legislation connected with the old United States Bank and only relates to suits wherein the United States itself sues a corporation upon "*a bill, note or other security.*"

Garnishment is in the nature of a statutory proceeding *in rem.* Its aim is to invest the plaintiff with a statutory right and power to appropriate, to the satisfaction of his claim against the defendant, property in the hands of the garnishee, or a debt due from the garnishee to the judgment debtor. It is a statutory grant to the plaintiff of a right of action in his own name againts the defendant.

Drake on Attachment, paragraph 452.
Strong vs. Smith, 1 *Metcalf* 176.

Garnishee proceedings rest exclusively and entirely upon statutes, and are but a substitute for a creditor's bill. *Freeman on Execution, paragraph* 392.

In Louisiana a valid judgment and a lawful *fieri facias*, or the right to a lawful *fieri facias*, are indispensable prerequisites to proceedings against any garnishee after judgment.

Featherstone vs. Compton, 3 *A.* 380.
Pollock vs. Williams, 9 *A.* 460.
Pooley vs. Snow, 12 *A.* 814.

If there is no valid writ of *fieri facias*, all proceedings are null and void *ab initio*. *Matta vs. Thomas*, 21 *A.* 37. On

March 17th, 1870, the legislature of Louisiana adopted an act entitled, "*An act to limit and restrict the power of courts to issue orders or writs of mandamus and fieri facias against the city of New Orleans and the officers thereof, and to declare the effect and prescribe the mode of satisfying judgments for money against the city of New Orleans.*" (*Session laws of* 1870, *extra session, p.* 10).

The second section of this act provides—

"That hereafter no writ of execution or *fieri facias* shall "issue from any of the courts in this State against the city of "New Orleans to enforce the payment of any judgment for "money against the city of New Orleans;"

and provides other methods and means of enforcing judgments against the city without resort to execution.

The third section of this act declares that the act shall go into immediate effect, and "that all acts and parts of acts in conflict with this act are hereby repealed so far as they are in conflict with the act." This act has continued in full force up to this date. It is therefore clear that both in 1872 and 1874, when the laws of the State were adopted by section 916 R. S., under the law of the State as it *then existed and was adopted*, process of execution against the city was *prohibited*. The federal courts took by adoption no right to issue execution against the city, and the Circuit Court had no legal right to issue execution originating *from any other source*, either *State* or *federal*. If this be true, the pretended *fi. fa.* in the case of *Hart vs. The City of New Orleans* is a nullity, and the marshal could not justify trespass under it.

This act No. 5 of 1870 has been construed by the Supreme Court of the state and its validity and effect declared. In *State ex rel. Carondelet, Canal and Navigation Company vs. Mayor, etc.*, 30 *A.* 129, The Supreme Court declared: "The act No. 5 of 1870 forbids the enforcement of judgments against the city of New Orleans by execution," and *that all kinds of property held by the city was exempt from levy.* In *State ex rel. Strauss vs. Brown, etc.*, 30 *A.* 79, the same court declared: "*The creditors*

of the city of New Orleans may sue and obtain judgment, but the city *has no property or rights not exempt from seizure under execution, because the statutes forbid the issue of execution against the city.*"

This Court in *Louisiana vs. New Orleans*, 102, *U. S.* 203, where the demand sought to be enforced was a judgment based upon bonds issued before the Act of 1870, held that so much of this statute as required the registry of the judgment with the Controller prior to any other step to enforce payment, was not such a modification of remedy as to violate the Constitution of the United States.

The assignors to Hart, if they ever had any demand against the city, had no demands that did not come into existence after the right to issue execution against the city had been cut off by the Act of 1870. If they contracted with the city it was with the full knowledge that there could be no *fi. fa.* resorted to, to enforce collection.

There is nothing in the record to show that any *fi. fa.* was issued in the case of Hart vs. New Orleans, prior to the alleged garnishee proceedings, except an allusion to a *fi. fa.* in the supplemental petition (Rec. page 37).

It is too clear for discussion that all systems of garnishment, as procedure, must depend upon *some statute*, and that there is no act of congress establishing any such general authority or procedure; therefore the federal courts must find in some *statute of the State* "in which it is held" a warrant for the proceeding, and find, further, that the State law has *been adopted by congress;* or if the law has been adopted by rule of court since June, 1874, must find a *State statute* adopted by a *general rule* of the circuit court held in the State.

The federal Revised Statutes, as a law, was adopted June 22, 1874. For all final process to enforce common law judgments for money, the federal courts must rest their authority upon section 916 of the Revised Statutes. Excepting in a few

special instances, in no manner relating to suits between private individuals, there is no other authority for either the writ of execution or supplemental proceedings based on execution, where the judgment is in a suit at law for the recovery of money. The section 916, R. S., is as follows:

"The party recovering a judgment in any common law cause, "in any circuit or district court, shall be entitled to similar "remedies upon the same, by execution or otherwise, to reach "the property of the judgment debtor, as *are now* provided in "like causes by the laws of the State in which the court is held "or by any such laws hereafter enacted which may be adopted "by the general rules of such circuit or district court, "and such courts may from time to time, by general rules, "adopt such State laws as may hereafter be in force in such "State in relation to remedies upon judgments as aforesaid, "by execution or otherwise."

The original act from which this section was taken was adopted June 1st, 1872 (17 *Stat. at Large* 197).

At all times since June 1, 1872, the federal court sitting in Louisiana, has been restricted by this legislation.

The alleged garnishment proceedings find no support or assistance from federal legislation *prior* to the act of 1872 or the Revised Statutes of 1874. The first federal process act is the act of September 29th, 1789, (1 *Stat. at Large*, 93). This act in its second section provides that, until further provision is made, writs of execution in federal courts shall be the same as "now used or allowed in the Supreme Court" of the respective States then in the federal union. The territory now included in Louisiana was at that time subject to alien dominion and jurisdiction, and could not have been affected by the act.

The next federal legislation relating to process is the act of May 8th, 1792 (1 *Stat. at Large*, 276), re-enacting the act of 1789 in so far as it related to executions, but provided for process in admiralty and equity. The first general process act adopted after Louisiana became a State in the Union is the

act of May 19th, 1828 (4 *Stat. at Large*, 278). This act, in effect, only extended former legislation to States admitted into the federal union "since the 29th day of September, 1789;" and enacted that writs of execution "shall be the same in each of the said States respectively as are now used in the highest court of general and original jurisdiction;" empowered the federal courts to adopt by rule subsequent changes made by the States or their courts; but the 4th section excluded Louisiana from the operation or benefit of the statute. In an act of congress adopted May 26th, 1824 (4 *Stat. at Large*, 62), it was enacted—

"That the mode of proceedings in civil causes in the courts
" of the United States that now are or hereafter may be es-
" tablished in the State of Louisiana, shall be conformable to
" the laws directing the mode of practice in the district courts
" of said State."

Power was given to the judges to alter the times limited for different proceedings in State courts, and to make rules necessary to accommodated State procedure and practice to the organization of the federal courts and to federal laws. Beyond doubt, this act only related to practice in progressing a cause from its commencement to final judgment, and did not relate to final process after judgment. Even if it did, the act was repealed by both the act of 1872 (17 *Stat. at Large*, 196), and the adoption of the Revised Statutes, June 22, 1874. If actually in force and unrepealed, its provisions do not aid the defendant in error; for if this act is to be construed as adopting process and proceedings as *they existed in Louisiana in* 1824, as the only act of the legislature of Louisiana relied on to warrant garnishment in aid of execution was not *adopted until* 1839, fifteen years afterwards, *garnishment* certainly is not a proceeding adopted by federal legislation of 1824. If, on the other hand, the act is to be considered as a process act, adopting for federal courts in Louisiana the law of the State as it might be found at the time when any future court "shall here-

after be established," the court in which Hart carried on his litigation and obtained judgment on his alleged garnishee proceedings is the Circuit Court of the United States for the Eastern District of Louisiana, a court which had its first existence, at least by its present name and style, on March 3d, 1881, eleven years after the latest date when execution and garnishee proceedings against the city of New Orleans ceased to be lawful or allowed by the State statutes. It is a significant fact that the act of 1824 does not allude to process, even in the most remote manner. The only rule of the circuit court relating to process now in force, or which has been in force since the November term, 1875, as a rule of the late circuit court for the district of Louisiana, is the first paragraph of rule 1, to-wit: "The practice, modes of proceeding and process to be used in the courts are controlled and regulated by the Revised Statutes of the United States, and will conform thereto."

If federal courts "held in" Louisiana, in default of authority granted by State or federal legislation, can appeal to English statutes and common law in force prior to the Revolution for authority to issue writs to enforce money judgments, then we have *elegit*, *fieri facias*, *levari facias*, *capias ad satisfaciendum*, *venditioni exponas*, for goods left in the hands of the marshal, at the expiration of the writ of *fiera facias*—in fact the entire menagerie of old English writs and remedies, with all of the old harsh and technical rules and practice as to *teste*, effect, duration, etc. Federal courts have no more right to adopt or issue any of these writs by force of English statutes or common law than they have authority to adopt and issue the writ *de excommunicato capiendo*.

Since the writ of error was sued out in this case this court, in *Fink vs. O'Neil*, 106 *U. S.* 272, where the direct question was involved, has declared that the only federal law relating to executions in suits at law in the federal courts between pri-

vate parties, are such provisions of State legislation on the subject as have been adopted by federal enactment.

Articles 245 and the first paragraph of article 246 of the Code of Practice of Louisiana, contain the original provisions relating to, and authorizing garnishee proceedings and authorize the proceeding only in aid of the *writ of attachment*. In 1839, by amendment, the second paragraph of article 246 as it now stands was added to the section and is the only warrant contained in the laws of the state for garnishee process in aid of execution to satisfy judgment. The following is the text of the paragraph added by the amendment of 1839.

"Article 246 * * * "And whenever a party plaintiff in "a cause has applied for a writ of *fieri facias* against the de- "fendant and has reason to believe that a third person has "property or effects in his possession or under his control "belonging to the defendant or is indebted to him, he may "cause such third person to be cited to answer under oath "such interrogatories as may be propounded to him touching "said property and effects or such indebtedness (*in the same "manner and with the same regulations as are provided in relation "to garnishees cases of attachment.*

"Such third persons shall thereupon be bound to answer "in the same manner, and shall be liable in the same man- "ner for his neglect or refusal to answer, and his answers may "be disproved in the same manner as those of garnishees. In "case such third person shall confess in his answers that he "has property or effects in his possession or under his control "belonging to the defendant or is indebted to him in any sum "of money the court shall order him forthwith to deliver up "said property to pay such sum (if the same be due, and "if not, when the same shall be due) to the sheriff, and a copy "of said order with the receipt of the sheriff indorsed thereon "shall be delivered to the said third person and shall be de- "creed equivalent to a receipt from the debtor himself.

"The property and effects in the possession of a third per- "son belonging to the defendant or debts due by him to such "defendant shall be decreed to be levied as by the sheriff "from the date of the same of interrogatories on such persons.

"And no seizure shall bind any property, money or effects, "rights or claims in the hands of a garnishee either under "process of attachment or *fieri facias* unless service of the "interrogatories has been personal upon such garnishee."

The garnishee proceedings in this case not being connected with any *mesne* writ of attachment must find warrant in proceedings to enforce execution after judgment and by the terms of the above quoted article must rest upon a lawfully issued writ of *fi. fa.* based upon final judgment.

The second section of the act of March 17th, 1870 (*Session Laws* 1870, *extra session* 10), enacts—

"That hereafter no writ of execution or *fieri facias* shall "issue from any of the courts in this state against the city of "New Orleans to enforce the payment of any judgment for "money against the city of New Orleans;"

Since the 17th day of March, 1870, article 246 of the Code of practice has read :

"* * * *And whenever a party, plaintiff in a "cause, has applied for a writ of fieri facias against the defend-"ant* (provided that defendant is not the city of New Orleans), "*and has reason to believe that a third person has property or "effects,*" etc.

The federal court *quoad* the city of New Orleans has been powerless to issue executions or *fieri facias* against the city of New Orleans to the same extent as the courts of the state.

When the act of 1872 adopted the state process for enforcement of judgments, that system was short an execution against the city of New Orleans and the *hiatus* has not been filled by federal legislation.

It follows that the execution issued in this case against the city was not only absolutely void but especially prohibited by law.

But if we assume, for the purpose of argument, that the federal court had a right to issue an execution in this case, state statutes to the contrary notwithstanding, in that case the defendant is no better off, for the repealing clause of the act of 1870 carried with it all of the garnishment laws and provisions of the statute relating to seizure in the hands of third parties, *as far as the city of New Orleans* is concerned.

Garnishment is in the nature of a statuatory proceeding *in*

rem. Its aim is to invest the plaintiff with a statuatory right and power to appropriate to the satisfaction of his claim against the defendant, property in the hands of the garnishee, or a debt due from the garnishee to the judgment defendant. It is a statuatory grant to the plaintiff of a right of action in his own name against the defendant.

Drake on Attachment, paragraph 452.
Strong vs. Smith, 1 *Metcalf* 176.

Garnishee proceedings rest exclusively and entirely upon statutes, and are but substitutes for a creditor's bill. *Freeman on Execution, paragraph* 392.

In Louisiana a valid judgment and a lawful *fieri facias*, or the right to a lawful *fieri facias*, are indispensable prerequisites to proceedings against any garnishee after judgment.

Featherstone vs. Compton, 3 *A.* 380.
Pollock vs. Williams, 9 *A.* 460.
Pooley vs. Snow, 12 *A.* 814.

If there is no valid writ of *fieri facias*, all proceedings are null and void *ab initio*. *Matta vs. Thomas*, 21 *A.* 37.

Since the act of 1870 there has been no statute permitting execution against the city of New Orleans, and therefore *no right* to garnishee process. The federal statutes on the subject are no broader than the State statute, and if it is conceded, even for the purposes of argument, that execution could lawfully issue in the case of Hart vs. the City of New Orleans from the federal court in Louisiana, it is clear that a creditor's bill is the only remedy at the hands of the judgment creditor; for the right to supplementary proceedings was repealed, and the act of congress took nothing of garnishee process by adoption, either under the act of 1872 or by the provisions of article 916, Revised Statutes. The only proceedings against garnishee, directly authorized by any act of congress,

are in suits by the United States against a corporation. *Revised Statutes* 935, 936, 937.

The act of 1870, prohibiting the issue of execution against the city of New Orleans on money judgments, has been held constitutional and binding by the highest court in the State.

State ex rel. Carondelet, Canal and Navigation Company vs. Mayor and Administrators of New Orleans, 30 *A.* 129.

State ex rel. Strauss vs. Brown, Administrator of Public Accounts, 30, *A.* 79; *and was considered by this Court in* Louisiana vs. New Orleans, 12 *Otto* 203.

The entire proceedings against the Canal and Claiborne streets R. R. Co. plaintiff in error, was and is void for want of authority or jurisdiction to resort to garnishee proceedings. *Fink vs. O'Neil*, 106 *U. S.* 272, is conclusive on this subject.

This cause was carried into the circuit court by removal from a State court

In East Tennessee V. & G. R. R. R. Co. vs. Southern Tel. Co., decided at the present term, reported in 5th Supreme Court Reporter, 168, the Court held that in cases of removal the United States courts succeed only to the powers of the State Court. The State court from which the removal was had was prohibited from issuing *fi. fa.* or garnishee process to enforce any judgment it might render. The federal court inherited the same prohibition.

We submit that there is no authority for the garnishee proceedings against plaintiff in error. The state court, had the case remained in that court, could not resort to execution and garnishment. The remedy was not enlarged or changed by removal, even if the removal was lawful.

How, under the legislature as it stands, can "*A copy of said order with the receipt of the sheriff*" (marshal) "*indorsed thereon*" if "*delivered to the said third person*" "*be decreed equivalent to a receipt from the debtor himself.*"

Fink vs. O'Neil, 106 *U. S.* 272.

East Tennessee R. R. Co. vs. Southern Tel. Co., 5 *Sup. Court Reporter* 168.

The property or alleged indebtedness by the plaintiff in error to the city of New Orleans arising, as disclosed in the answers to interrogatories propounded, was beyond the reach of any *fi. fa.* If it is an existing indebtedness it is a part of the public revenues and public income of the municipal corporation.

The terms of section 916, Revised Statutes, limit the effect of execution on money judgments as it is limited by the State law, carrying, among its limitations, all of the exemptions from levy which attach to a like execution issued from a State court. Consequently property not within the reach of an execution from a State court, by reason of exemption from levy, is equally beyond the reach of an execution issued from a federal court. On the face of the record and proceedings in this cause, the alleged property-creditor debt of the Canal and Claiborne Streets Railroad Company, disclosed in the answer to interrogatories (if any such indebtedness appears), was beyond the reach of any execution from its character.

The power of the city of New Orleans to grant the right of way for street railroads over and through its streets, is not a private right or authority of the corporation, but is public in all respects and particulars. The price, consideration or bonus paid, or contracted to be paid, by grantees of the right of way, is of *the public revenues* of the city, to the same extent as are assessed taxes, and necessarily exempt from levy to the same extent. If exempt from levy, certainly beyond the reach of any garnishment process.

Municipality No. 1 of the city of New Orleans, at a time when the city was divided into municipalities, at one time leased out some real estate that had at one time been a public common on ground rents. The ground rents due from tenants were held beyond the reach of execution or garnishment.

New Orleans and Carrollton R. R. Co. vs. Municipality No. 1, 7 *A.* 148.

Egerton vs. Municipality No 3, 1 *A.* 435.

Hart vs. Municipality No. 3, 6 *A.* 435.

Police Jury of West Baton Rouge vs. Mitchell and others, 4 *A.* 84.

New Orleans vs. Morris, 105 *U. S.* 600.

It is clear, therefore, that had there been a statute authorizing the issue of execution against the city of New Orleans, the writ could not have been lawfully levied upon the bonus contracted to be paid by the Canal and Claiborne Streets Railroad Company to the city as consideration for its right of way through the streets. If such levy is ever held to be lawful, we shall next hear of a levy upon the *right of the city to grant street railroad franchises*, as, under the statute of Louisiana, execution against the property of an ordinary debtor can be levied upon nearly every right, tangible or intangible, and is peculiar in that respect. Since March 17th, 1870, the exemption of the property of the city of New Orleans and its credits from any levy, *has not depended upon the question whether the property was public or private* (if a municipal corporation can possess private property), nor upon the question whether the property was in *public use or not*, for the *entire property* of the corporation, irrespective of its character or destination, was exempted by statute. In *State ex rel. Carondelet Canal and Navigation Company vs. Mayor, etc.*, 30 *A.* 129, the Supreme Court declared: "The act No. 5 of 1870 forbids the enforcement of judgments against the city of New Orleans by execution," and *that all kinds of property held by the city was exempt from levy.* In *State ex rel. Strauss vs. Brown, etc.*, 30 *A.* 79, the same court declared: "*The creditors of the city of New Orleans may sue and obtain* judgment, but the city *has no property or rights not exempt from seizure under execution, because the statutes forbid the issue of execution against the city.*"

The defendant in error can set up no complaint of impaired remedy by the operation of this act, for the act of 1870 antedates the oldest claim of the pretended transferees of Hart.

We respectfully insist that a *retroactive* act of congress is necessary to rescue the execution in the case of Hart against the city of New Orleans, with all the seizures and garnishments under it, from absolute nullity.

If for the purpose of argument it is admitted that the defendant in error can find warrant for *fi. fa.* and garnishee proceedings he would be in no better condition. This alleged judgment is, as he claims, based upon a Louisiana statute and the proceedings are bad for non-compliance with the statute. No issue of fact not determinable by the record was ever tendered to the plaintiff in error. No issue was ever joined on the supplemental petition of Hart, nor has there been any trial in the lower court.

The only paper on which the verdict and judgment can rest, the only tender of any issue for trial, is in the document styled by counsel of defendant in error (also so named in the entry on the minutes of the court) "the traverse of the answers of the Canal and Claiborne Streets Railroad Company, and the only matter which ever *came on for trial*," is the issue or the issues tendered by that paper. The paper in question is set forth in full above, and is printed on page 42 of the printed record.

Now what is the issue tendered for trial by this document? It is this and nothing more: "*Why the interrogatories should not be taken as confessed*," and "*why judgment should not be rendered against them for the amount of plaintiff's claim and cost.*" viz.: why the Canal and Claiborne Streets Railroad Company should not be punished to the full extent of Hart's judgment, interest and cost, for *contumacy in not answering the interrogatories* annexed to the supplemental petition, as required by law.

The only law in force in the State which can be cited as a support for such a proceeding is article 263 of the Code of Practice of the State. This article reads:

"If the garnishee, to whom the interrogatories have been put "refuse or neglect to answer the same under oath in the delay "of the law, such refusal or neglect shall be considered as a "confession of his having in his hands property belonging to "the debtor to satisfy the demand made against such debtor, "and judgment shall be rendered against him for the amount "claimed by defendant (plaintiff) with interest and cost."

What earthly issue of fact triable by a jury is tendered by this paper? The only issues tendered are whether the Canal and Claiborne Streets Railroad Company *had refused or neglected to answer the interrogatories on oath "in the delay of the law."* This issue was triable *only by the record.* Whether the answers filed by the railroad company were so *invalid* as to authorize a judgment, that the company was in such contumacy and default as to be held *not to have* answered within the delay allowed by law, was an issue triable *only by the record* and by the inspection of the purported answers. There was nothing of fact *dehors* the record at issue. Whether the company was in such default as to "be considered as a confession of its having in its hand property belonging to the debtor sufficient to satisfy the demand made against such debtor, and whether, for that reason, "*judgment shall be rendered against him for the amount claimed by the defendant, with interest and cost,*" irrespective of the fact of actual indebtedness by the garnishee, as a *punishment to be pronounced against him* was a *question of law* which could only be determined *by the record.*

This question was made purely a question of law by the terms of the statute. The only issue of fact that could go to the jury, if any issue of fact can be tortured out of this paper, was the single question, whether there had been any answers of any kind to the interrogatories propounded. The verdict, if any could have been rendered, should have been responsive to that issue. This issue could not have been sent to a jury in

a Louisana court, even under the tropical system of procedure which prevails there, where the jury in civil cases is the judge of *both law and fact*, as the fact was triable only by the record.

That no evidence can be heard on a rule to show cause why interrogatories in garnishee proceedings shall not be taken as confessed, and the penalty provided in art. 263, C. P., adjudged was settled in *Hart vs. Dalgreen*, 16 *La.* 559; *Sturgis vs. Kendall*, 2 *A.* 566; *Henry vs. Bryce*, 11 *A.* 691; *Kembrough vs. Castle*, 19 *A.* 128.

Something is said in the brief of defendant in error of the plea of prescription, found on page 43 of the printed record. This was a plea, not to the rule or *scire facias*, but to the alleged supplementrary petition, and, as shown by the record, has never been tried or disposed of. By the terms of article 246 of the Code of Practice, the only statute authorizing garnishment proceedings under execution, "proceedings in garnishment under execution are declared to be governed by the statutes relating to garnishment *in cases of attachment*." Article 247 of the Code of Practice provides that a creditor may, if he likes, add to his petition, or supplemental petition, interrogatories on "facts and articles;" but this is elective, and not compulsory. Article 252 of the same code enacts:

"If there be a garnishee made party to the suit, the clerk "must deliver or send to the sheriff a copy of the petition and "of the interrogatories annexed to it, if there be such, with a "summons directed to such garnishee to answer the same "within the delay given in ordinary suits."

Article 262 of the same code enacts: "The garnishee who "has been cited in a suit, must put in his answer within the "usual delay, declaring in the same, fairly and truly, what "property belonging to the defendant he has in his possession, "by whatever title he may possess the same, as well as what "sums he may owe to such defendant, whether the same be "due or not yet due, and if interrogated on facts and articles, "he must answer under oath, clearly and categorically, each "question put to him of interrogatories on facts and articles, "touching such matter."

Article 348 of the code is a definition: "Interrogatories on

"facts and articles are questions put in writing, in the form of "articles, and annexed to a petition or to an answer to which "one of the parties to the suit prays that the other be ordered to "respond under oath, in order to make use of his answers as "testimony in support of his demand or to aid him in his "defense."

Article 354 defines the use to be made of answers to interrogatories on facts and articles, as follows:

"The answers of the party interrogated are evidence, but do "not exclude adverse testimony, and shall be weighed by the "judge as other testimony." Article 356 enacts: "The party "wishing to avail himself of the confessions made by the ad- "verse party in his answer to an interrogatory on facts and "articles must not divide them; they must be taken entire."

The court will perceive that answers in garnishment proceedings are placed on the same footing as interrogatories propounded in a bill in equity, the object being to obtain evidence to use on the trial of the real issue. This is made more evident by the terms of article 264 of this code, the only article which provides for the contradiction of the answers of the garnishee to interrogatories on facts and articles. This article enacts: * * *

"The plaintiff may, nevertheless, show the same to be false, "either by positive written proof or by the oath of two wit- "nesses worthy of belief, in the same manner as when inter- "rogatories on facts and articles have been put to a party in a "suit."

Establishing practically the same rule as in equity. It is as clear and unambiguous as legislation can make it, that the answer to the garishment *suit* is the *answer* to the *supplementary petition*, and that the answers to interrogatories, if made, may be used as evidence on the trial of that issue. The defendant in garnishment proceedings has the right to make any issue he may see fit on the supplementary petition.

The plea of prescription in this case was a plea to the *supplemental petition*, and not a plea or *answer* to the *scire facias*, or pretended traverse, and has not been tried, as it did not go to the jury. Nothing contained in the supplemental petition

has been tried as yet, as it appears by the record; at least, there is no record of any such trial.

The cases referred to in the brief of defendant in error on the motion to dismiss or affirm made in this case relate to proceedings, not had *under article* 263 of the Code of Practice, to the end of having the interrogatories taken for confessed, for want of sufficient answer, or any answer at all, as was done in this case, but relate to irregular proceedings taken under article 264 of the code, to compel the garnishee to *pay to the creditor*, not the entire amount of the creditor's *debt, with interest and cost*, but the sum absolutely due or to become due by him to the judgment debtor, his answers to the contrary notwithstanding. This method of proceeding was *was not resorted to in any form* in this case. It needs no argument to establish that proceedings under article 263 of the code are *punitive*. They are set on foot to enforce a *penalty* for contumacy. That penalty is the *entire debt* due the creditor, with interest and cost, irrespective of the actual amount the garnishee may really owe to the judgment debtor. Proceedings under article 264 are had to ascertain and recover the *actual amount* due from the garnishee, his answers to the contrary notwithstanding. Under the latter article, the garnishee is in no worse condition than he would have been had he answered truthfully. The garnishee cannot be compelled to pay the entire claim of the defendant, by reason of *false answers*. It is only where he *refuses* or *neglects* to answer.

Hart elected to enforce a supposed remedy under *article* 263, and tendered no other issue. There was nothing else to be tried and nothing to go to the jury.

We respectfully submit that the judgment of the circuit court is erroneous

1st.

Because the court never acquired jurisdiction of the case of Hart vs. New Orleans. That an affidavit of local prejudice

made ten days before that suit had existence does not satisfy the demands and requirements of the "Local Prejudice" clause of art. 639, R. S. That the record must show "local prejudice" existing as a fact at a time when the suit is actually pending.

That the "local prejudice" must be a prevading and prevailing prejudice in community against the party himself or against his cause.

That the fact that the highest court in the State in construing the power of the municipal corporation of New Orleans, had correctly held that under both constitutional and statutory prohibition and interdiction prohibiting the city from warranting except against actual cash and making the violation of the prohibition *felony*, the ordinances gathered up by Hart were not in that form, evidences of debt to be gathered up and sued as obligations of the city, whatever may have been the legal effect of the obligation of the city for the original claim growing out of work or labor done or supplies furnished, is not to be classed as the outgrowth of the "local prejudice" named and referred to in art. 639.

2d.

Because garnishee proceedings depend entirely upon the statutes of Louisiana. That to vest the circuit court with power to proceed against plaintiff in error as a garnishee, there must be a lawfully issued *fi. fa.*, or at least a lawful right to issue *fi. fa.* against the city of New Orleans, and there existed no authority either in the statutes of Louisiana or of the United States to issue any *fi. fa.* in the case of Hart vs. New Orleans. If the case had remained in the state court no writ of *fi. fa.* could have been issued and none could lawfully issue from the federal court. That even if authority to issue *fi. fa.* on the judgment can be found coming from any other source than the legislation of Louisiana or the United States such writ would

not carry with it any right to garnishee proceedings. All right to such proceedings having been repealed by act No. 5, 1870.

3rd.

Because the alleged indebtedness of the plaintiff in error, if an existing debt to the city constituted a portion of the public revenues of the city not liable or subject to levy under any form of process for the collection of debts due or adjudged against the city.

4th.

Because the judgment debtor was not made a party to and concluded by the alleged garnishee proceedings, nor allowed a day in court, and the plaintiff in error is not protected against a demand from the city for the same alleged debt.

5th.

Because the supplemental petition against plaintiff in error does not disclose or set forth a cause of action, in that it does not show that the alleged indebtedness of plaintiff in error is not public revenue.

6th.

Because no issue of fact triable by jury was made by the *scire facias*, or motion to take the indebtedness as confessed.

7th.

Because if the interrogations could lawfully be taken as confessed, such confession would not warrant the judgment rendered as with that order passed the record would not show the confessed indebtedness to be of such character and origin as to be subject to levy to satisfy the judgment in Hart vs. New Orleans.

8th.

Because there was and is no warrant for the allowance of interest at the statutory rate of five per cent as in case of liquidated demands, nor for computing the time when interest began to run, by adopting the arbitrary date as shown in the verdict and judgment, to-wit, the 1st of July of each year.

We respectfully submit that the judgment of the circuit court against the Canal and Claiborne Streets Railroad Company should be reversed.

J. R. BECKWITH,

Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1882.

No. 943.

CANAL AND CLAIBORNE STREET R. R. CO. GARNISHEE,
PLAINTIFF IN ERROR,

vs.

JUDAH HART.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANT IN ERROR, ON MOTION TO DISMISS AND AFFIRM.

E. HOWARD McCALEB,
Attorney for Defendant in Error

A. W. Hyatt, Print, 73 Camp St. N. O.—2632

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 943.

CANAL AND CLAIBORNE STREET R. R. CO. GARNISHEE,
PLAINTIFF IN ERROR,

versus

JUDAH HART.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANT IN ERROR, ON MOTION TO DISMISS AND AFFIRM.

STATEMENT OF CASE.

On March 3d, 1882, Judah Hart obtained a judgment at law, in the court below, against the City of New Orleans, for the sum of $121,697 18, with interest and costs [p. 34].

On March 15th, 1882, having issued a fi. fa. against the judgment debtor, he filed a supplemental petition, in accordance with the provisions of Arts 246 and 642 of the Code of Practice of Louisiana, averring the issuance of such fi. fa.; that he had reason to believe that the Canal and Claiborne Street Railroad Company, a corporation organized under the law of Louisiana, was indebted to the defendant in execution, and that he had caused a seizure to be made in the hands of said company.

The prayer was, that said company be cited and ordered to answer, under oath, the annexed interrogatories, and that the

said company be condemned to pay the amount of the judgment and costs [p. 37].

On this petition the court made an order directing the company to answer the interrogatories, as prayed for [p. 38].

Citation in garnishment, in due form of law, was issued and served on the company [pp. 38-9].

On March 25th, the company, without making any objections or interposing any exception, plea or demurrer, filed its answer as follows [pp. 41-2]:

"The Canal and Claiborne Street Railroad Company, made garnishee herein, now comes into court, and for answer to the interrogatories propounded, by and through its President, E. J. Hart, says:

To the first interrogatory, no; except taxes of 1882.

To the second interrogatory, no; except for taxes of the year 1882.

To the third interrogatory, no. And for a full and correct statement of the facts upon which the above answers are made, respondent, further answering, says, that the privilege of the right of way of the said Canal and Claiborne Street Railroad Co. was granted for and in consideration of a bonus of two-sixteenths of a cent per passenger, payable monthly. The rate of fare is five cents per passenger.

That the total receipts of the company from 1st March, 1870, to 15th March, 1882, are" [Here follows detailed statement of receipts].

"Your respondent further says, that the receipts from the 15th March, 1872, to 15th March, 1882, amount to the sum of $1,046 918.

Your respondent, further answering, says, that *he is informed and believes* that the bonus was in lieu and place of the license; that the city could not claim both; that it has ceased to demand

the bonus, but has imposed a license on the company, and the company has paid the same in 1880, based on the receipts of 1879, in 1881, based on the receipts of 1880, and in 1882, based on the receipts of 1881, viz: $375 each year, making in all $1125, thereby releasing the company from any obligation to pay any bonus for said years.

And respondent further says, that he is *informed and believes* that any claim for the bonus, based on the receipts of preceding years, is prescribed.

Respondent further *swears*, that the said Canal and Claiborne Street Railroad Co. has already been garnisheed in the suits of Myra C. Gaines, Sam'l Smith, Subrogee, vs. City of New Orleans, No. 2695 of the United States Circuit Court, and of Charles Parsons vs. City of New Orleans, No. 8088 of the same court, and that should judgments be rendered against said company, they will amount to *more than the company can, in any event, owe.*

Respondent further says, that the company has claims against the city of New Orleans for damages caused by overflows in 1869, 1871 and 1881, and against which it should have been protected by the city: and that the amount due for said damages *exceeds any amount which would be due for the bonus, if any was due.*

For this and other reasons, the city has not required the bonus"

On March 30th, the plaintiff in execution, according to the practice in Louisiana, made a motion suggesting that the company's answers were *false and untrue*, and that it was indebted to the city of New Orleans *on a much larger sum than stated in its answer*, and suggesting further that the plaintiff traversed the said answers *both in law and in fact;* obtained an order upon the said company to show cause, on the 5th day of April, 1882, why the interrogatories should not be taken for confessed, and *why judgment should not be rendered against it for the amount of the plaintiff's claim and costs* [pp. 12–13].

On the day named in the rule, the company appeared and plead the statute of limitations (or prescription, as we call it) of three and ten years [R. p. 43].

On the same day the counsel for the plaintiff, and the defendant in execution, filed a stipulation, in writing, to the effect that any and all sums paid by the garnishees should be deposited in the registry of the court to await the decision of the question between the plaintiff and defendant, whether such money was subject to seizure under the plaintiff's executions [p. 43].

On the same day, *without any objection or exception of any kind*, all the parties went to trial on these issues [p. 44]. The minutes of the court say [Ib]:

"The traverse to the answer of the Canal and Claiborne Street Railroad Company, garnishee, came on for trial—E. H. Farrar, for plaintiff; H. D. Ogden, for garnishee—when the following named jurors were called and sworn to well and truly try the issue herein, etc.

And, after hearing the pleadings, the evidence, and argument of counsel, and receiving a charge from the court, the jury retired to deliberate on their verdict," etc.

The jury found for Judah Hart against the company for the sum of $33,684 44, with interest from various dates [p. 44].

Upon this verdict the following judgment was entered in the minutes of the same date [p. 58]:

"By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged and decreed that the Canal and Claiborne Street Railroad Company, garnishees herein, be condemned to pay the plaintiff, Judah Hart," etc., (naming the sum and interest found in the verdict).

"It is further ordered, adjudged and decreed that said amount, with interest, as aforesaid, be deposited in the registry

of the court, subject to the terms of the stipulation this day entered into by counsel for said plaintiff and C. F. Buck, City Attorney, for the city of New Orleans, on file herein."

No exceptions were reserved, and no bills were taken, either to the charge of the court or to any ruling made during the progress of the trial.

The company having, as appears by its rambling and shuffling answer, no defense whatever to the payment of its just debt to the city, and there being absolutely nothing in the record upon which error could be assigned here, and desiring and striving to raise or create some excuse to bring the matter here, in order that they might have another delay of years, employed additional counsel, and presented a motion for a new trial [p. 45].

The new trial was denied [p. 54].

In the meantime, on April 19th, 1882, while the motion for a new trial was pending, the court entered an order amending *nunc pro tunc*, the judgment entered on the above verdict, as follows:

"And considering the stipulations made herein between the counsel for the plaintiff, the city, attorney, the garnishee, and the counsel for Chas. Parsons and Sam Smith:

It is ordered, that the garnishee pay the said amount, with interest, as aforesaid, into the registry of the court, subject to the rights of all parties concerned."

Motion was made by the garnishee to expunge the word "garnishee" from the first paragraph of this entry, the company disputing the fact that it had ever made any such consent, and pleading that rule 22d of the court required all such consents to be in writing [p. 52].

This motion was allowed [pp. 57–8].

The motion for a new trial being refused, the garnishee thereupon filed a proceeding which he called a motion in arrest

of judgment, setting forth ten utterly frivolous grounds, and asking "that the proposed judgment written up in this cause upon the minutes and record of the court against the said corporation, as garnishee, be expunged from the record and the minutes, and that the same be never signed and made operative, and that any and all judgments against said Canal and Claiborne R. R. Co., by reason of any supposed proceedings against the said corporation as garnishee, or by reason of any verdict herein, be arrested" [pp. 52-3-4].

The motion concludes as follows:

"Tenth—That there is nothing in said record to warrant or support any judgment against the Canal and Claiborne Street R. R. Co., as garnishee, in favor of the said Judah Hart, the plaintiff in judgment, or any other person; and prays this Honourable Court to fix a time when said motion can be heard, and that the said Judah Hart, *and the said city of New Orleans, be notified hereof*" [p. 54].

On this motion the court entered the following order [p. 54:

"Upon due consideration of the motion in arrest of judgment herein, this day presented and filed by the Canal and Claiborne Street Railroad Company, garnishee, it was ordered by the court that said motion be heard on Wednesday, 26th inst., at 11 A. M., and that plaintiff *and the City of New Orleans, be notified thereof by service on them of a copy of said motion in arrest of judgment*"

The matter was heard on the day fixed, and the motion was overruled [p. 58].

To the overruling of this motion the garnishee took a bill of exceptions [p. 59], *and this is the only error which is assigned upon the record* [pp. 71-2-3.]

The judgment being signed, the company took a writ of error, *making Judah Hart alone a party defendant therein, and not making the City of New Orleans a party defendant thereto at all.* See

copy of writ lodged [pp. 70–71], motion and bond for *supersedeas* [p. 60], and citation in error [pp. 74–5]. The return on the citation, which is addressed to Judah Hart, after stating the mode and manner of service on Judah Hart, goes on to say [p. 75]:

"And on the same day, month and year, I left a duplicate original *of the within citation* in error in the hands of Joseph A. Shakspeare, in the City of New Orleans, at the same time informing him of the nature of said citation."

Who Joseph A. Shakspeare is neither the return, nor the record—so far as the writ of the company is concerned—discloses.

POINTS OF LAW ON MOTION TO DISMISS.

Motion is now made to dismiss this writ on the ground:

"*That the proper and necessary parties have not been made by plaintiff in error, for the reason that the City of New Orleans was a party, on the record below, to the matter at issue between the plaintiff and defendant in error, and is interested in the maintenance of the judgment, to reverse which this writ of error has been taken, and should have been made a party hereto in due form of law*"

ARGUMENT ON MOTION TO DISMISS.

The City of New Orleans is the defendant in execution, and is the creditor of the Canal and Claiborne Street Railroad Company, according to the latter's admissions in its answers to the interrogatories.

The supplemental petition and interrogatories in garnishment were a proceeding merely incidental and auxiliary to the execution proceedings, to which the city was necessarily a party.

It is clear, from the terms of the judgment on these incidental proceedings, that the city is both a *formal* and a *substantial* party thereto. That judgment embodies and consecrates a stipulation between the city and her creditor, Judah

Hart, that the sum therein and thereby adjudged against the Canal and Claiborne Street Railroad Company, shall by it be paid into the registry of the court, subject to the rights of all parties concerned. It is just as much a judgment in favor of the City of New Orleans as in favor of Judah Hart. To which of the two the proceeds of the judgment shall go, was to be settled by another proceeding in the same case, which proceeding was taken, and the result of which is before this court on a writ of error, embraced in the same transcript with this case. *Non constat*, but that this fund may, in that proceeding, be adjudged to the city. But what will be the result if this judgment is reversed?

What will then become of the fund about which the city and Judah Hart are litigating?

It is clear, therefore, that the city is not only a formal party to these proceedings in execution, and to the judgment in which they culminated, but that she is materially interested in the maintenance of that judgment here. This was so patent to the plaintiff in error, in the court below, that it *deemed it essential to make the City of New Orleans a party to the motion in arrest of judgment* [p. 54]. And such, also, was the opinion of the court [Ib]. Its conclusions tend to the annulment of the whole judgment.

As remarked, in stating the case, it is upon the refusal of this motion alone that there is any error assigned.

Such being the case, there can be no doubt that the city was a necessary party defendant to this writ of error.

It is elementary that all parties on the record must be either plaintiff or defendant in error.

Williams vs. Bank of U. S., 11 Wh. 414;
Deneale vs. Archer et al., 8 Pet. 526;
Wilson vs. Life Ins. Co., 12 Pet. 140;
Todd et al. vs. Daniel, 16 Pet. 521;
Masterson vs. Herndon, 10 W. 416;

Hampton vs. Rouse, 13 W. 187.

It may be contended that the return of the Marshal, above referred to, with reference to the service of a duplicate original of the citation in error on Joseph A. Shakspeare, is a service upon the city of New Orleans.

The return does not mention or show who Joseph A. Shakspeare is.

The record of this case makes no such mention or showing.

If the court were at liberty to look beyond the record included in the present writ of error, into the whole transcript, brought here by two other writs of error, it might appear that Joseph A. Shakspeare is the Mayor of the city of New Orleans. But evidently no such liberty exists.

Even if it should appear that Joseph A. Shakspeare was the Mayor of the city, such a service upon him would be of no avail:

1st. Because the citation in error, as shown by the return, was addressed to Judah Hart alone.

2d. Because the city of New Orleans was not named in the writ of error.

3d. Because the city was not named in the bond.

Under these circumstances, service on the city of a citation in error, addressed to Judah Hart, would not make the city a party to the writ.

I submit that this writ must be dismissed.

POINTS OF LAW ON MOTION TO AFFIRM.

In case the court should deny the above motion to dismiss, motion is made to affirm the judgment on the grounds:

1st. That it is manifest that the writ was taken for delay, as there is nothing in the record upon which error can be assigned.

2d. That the assignments of error, made by the plaintiff, are so utterly frivolous as not to need further argument.

ARGUMENT ON MOTION TO AFFIRM.

1st. The record in this case consists of the supplemental petition in garnishment, the interrogatories annexed, the order of the court directing the garnishee to answer, the citation in garnishment, the answer of the garnishee, the rule traversing those answers, both in law and in fact, the garnishee's plea of the statute of limitations, the stipulation between plaintiff and defendant in execution, extract from the minutes showing the empaneling of the jury and the trial of the cause, the verdict of the jury, the judgment thereon entered, the motion for a new trial, the order refusing it, the motion in arrest of judgment, the order refusing it, and *the bill of exceptions taken upon the refusal of the motion in arrest of judgment.*

If, therefore, no error can be assigned on a motion in arrest of judgment, then there is nothing in the case on which error can be assigned.

A motion in arrest of judgment, in a civil cause, is a proceeding unknown to the law of Louisiana. The proceedings in the court below, being on the law side, are to be governed by the law of Louisiana.

Art. 556 of the Louisiana Code of Practice says:

"Definitive judgments may be revised, set aside or reversed:

1st. By a new trial;
2d. By appeal;
3d. By action of nullity;
4th. By recision.

This last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them."

If a motion in arrest of judgment is known to the law of Louisiana, it falls into one of these four categories.

Plainly it does not come within either the second or the fourth.

Nor does it come within the third. Art. 610, of the same Code, provides that such an action must be brought in the court which rendered the judgment, by petition and citation, and that the adverse party must be cited to appear as in ordinary suits.

We have, then, but one category left to discuss—new trial. If, now, such a motion is equivalent to a motion for a new trial, no error can be assigned here upon the refusal below.

Such has been the uniform jurisprudence of this court since its organization.

Henderson vs. Moore, 5th Cranch, 11;
Warner vs. Norton, 20 H. 448;
Indianapolis R. R. Co. vs. Horst, 93 U. S. 291;
Newcomb vs. Wood, 97 Id. 581;
Railway Co. vs. Heck, 102 Id. 120.
Jones vs. Buckell, 104 Id. 555.

The bill of exceptions taken to the refusal of the motion is a nullity. Such a bill can be taken only to some ruling during the progress of the trial, or to the charge of the judge to the jury.

After verdict and judgment entered thereon, the trial is ended and the record is closed. There is no room for a bill of exceptions on anything that can take place in due course of proceedure between the entry of the judgment and its signature.

Even under the common law system of pleading, a motion in arrest of judgment is nothing but a proceeding whereby the attention of the inferior court is called to some fundamental error patent on the face of record—such an error as could be assigned in the superior as well as in the inferior court. From this point of view it would be just as irregular to take a bill to the overruling of a demurrer, as a bill to the overruling of motion in arrest of judgment.

2d. The grounds stated by the garnsihee as reasons why the judgment should be arrested, are so frivolous as to justify the demand of the defendant for the imposition of the penalty of ten per cent. provided for in the 2d section of the 23d rule of this court.

Here are the grounds in full [p. 534]:

1st. That there is nothing in the said supposed proceeding of garnishment to warrant or support any verdict or any judgment of any kind against the said corporation, the Canal and Claiborne Street Railroad Company, in favor of the said Judah Hart, the plaintiff in execution, or any other person.

2d. That there is no issue made in the said cause, nor had there been any issue or default made on the said supplemental petition herein prior to the said verdict, nor at any time.

3d. That there has been no issue or service of any citation against or upon said supposed supplemental petition in this cause, either directed to or served upon the said mover, the Canal and Claiborne Street Railroad Company.

4th. That there has been no service upon the mover of the original and supplemental petition in this cause, with due citation, as appears by the record herein.

5th. That there has been no service of the supplemental petition upon the defendant in execution, the city of New Orleans, and the said city of New Orleans has not been made a party to, or brought into court in said proceeding against the Canal and Claiborne Street Railroad Company, the mover, in such a manner as to conclude the said city of New Orleans in any alleged demand against the said mover, or in any such manner as to warrant or sustain any verdict or judgment against the said mover as garnishee.

6th. That it appears from the record herein, that at the time when said matters were submitted to the jury, there was

no issue of fact to go to the said jury; that there was no answer to the supplemental petition in any default therein.

7th. That had there been any issue of fact submitted to the jury, the said question was not whether the plaintiff, Judah Hart, should have a verdict against the Canal and Claiborne Street Railroad Company, garnishee, but whether the said supposed answer to interrogatories on facts and articles should be taken as confessed, and used upon the trial of the issues made or to be made, on the said supplemental petition; said issues had not been made either by answer to said supplemental petition or judgment by default thereon.

8th. That it appears from the record in said cause that under no circumstances could the Canal and Claiborne Street Railroad Company become, or be liable to pay any supposed balance due the City of New Orleans to said plaintiff, Judah Hart, for the reason that it appears from the record herein, that said supposed debt of the Canal and Claiborne Street Railroad Company to the City of New Orleans, the defendant in execution, if due, and owing was and is, a part of the municipal revenues of the city, beyond the reach of execution or garnishment process, and that had the said Canal and Claiborne Street Railroad Company, garnishees, produced the money or property claimed in kind or in species, and placed and held the same within reach of the plaintiff in execution, he could not lawfully levy any *fi. fa.* upon the same.

9th. That under the statutes of the State no interrogatories on facts and articles can be directed to a non-sentient being or corporation in garnishee proceedings, as the said interrogatories on facts and articles are only the means of probing the conscience to procure evidence.

10th. That there is nothing in the said record to warrant or support any judgment against the Canal and Claiborne Street Railroad Company, as garnishee, in favor of the said Judah Hart, the plaintiff in judgment, or any other person.

The first and tenth grounds are identically the same in form and substance, and are mere general declarations without any force or validity.

However, it will be well to demonstrate here the entire regularity of the proceedings.

Art. 642 of the Code of Practice of Louisiana provides:

"This writ (the writ of *fi. fa.*) is directed to the sheriff of the parish where the property of the debtor is situated, and orders him to seize the property, real and personal, rights and credits of the debtor, and to sell them to satisfy the judgment obtained against him," etc.

And whenever a party, plaintiff in a cause, has applied for a writ of *fieri facias* against the defendant, and has reason to believe that a third person has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer under oath such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment, and pursuant to special laws," etc.

Article 246 of the same Code, under the head of "ATTACHMENT IN THE HANDS OF THIRD PERSONS," provides:

"If a creditor know or suspect that a third person has in his possession property belonging to his debtor, or that he is indebted to such debtor, he may make such a person a party to the suit, by having him cited to declare, on oath, what property belonging to the defendant he has in his possession, or in what sum he is indebted to such defendant, even when the term of payment has not yet arrived.

The person thus made a party to the suit is termed the garnishee.

And whenever a party plaintiff in a cause has applied for a writ of *fieri facias* against the defendant, and has reason to believe that a third person has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer, under oath, such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment. Such third person shall thereupon be bound to answer in the same manner, and shall be liable in the same manner for his neglect or refusal to answer, and his answers may be disproved in the same manner as those of garnishees. In case such third person *shall confess* in his answers that he has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him in any sum of money, the court shall order him forthwith to deliver up said property, to pay such sum (if the same be due, and if not, when the same shall be due) to the sheriff," etc.

Arts. 250, 251 and 252 of the same Code provide:

"ART. 250. A garnishee may be made party to a suit, and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition, or by a supplemental petition filed at any stage of the suit, *previous to rendering the judgment.*

ART. 251. When an order to attach property in the hands of a third person has been given by a court, the clerk of such court shall deliver or send to the sheriff a copy of such order, as well as of the petition, together with a citation to the person made party to the suit, to answer such petition within the usual delay granted in ordinary cases.

ART. 252. If there be a garnishee made party to the suit, the clerk must deliver or send to the sheriff a copy of the peti-

tion and of the interrogatories annexed to it, if there be such, with a summons directed to such garnishee to answer the same within the delay given in ordinary suits."

Articles 262, 263 and 264 are as follows:

"ART. 262. The garnishee, who has been cited in a suit, must put in his answer within the usual delay, declaring in the same, fairly and truly, what property belonging to defendant he has in his possession by whatever title he may possess the same, as well as what sums he may owe to such defendant, whether the same be due or not yet due; and if interrogated on facts and articles, he must answer under oath clearly and categorically, each question put to him touching the matter.

ART. 263. If the garnishee, to whom interrogataries have been put, refuse or neglect to answer the same under oath in the delay of the law, such refusal shall be considered as a confession of his having in his hands property belonging to the debtor, sufficient to satisfy the demand made against such debtor, and judgment shall be rendered against him for the amount claimed by the defendant, with interest and costs.

ART. 264. Although the answer of the garnishee to the questions put to him be made under oath, the plaintiff may, nevertheless, show the same to be false, either by positive written proof, or by the oath of two witnesses worthy of belief, in the same manner as when interrogatories on facts and articles have been put to a party in a suit; and if it be proved by such evidence that the garnishee has in his hands property or effects belonging to the party against whose property the attachment has been granted, or that he be indebted to him in any amount, such property and effects, as well as such sum as may be due by him, shall be subject to satisfy such judgment as may be rendered against the defendant."

These articles stand now as they stood in the Code of 1825, prior to the passage of the Act of March 30th, 1839, which

allowed garnishment proceedings *after judgment*, on the issuance of a *fi. fa.*, the provisions of which act are embodied in Arts. 642 and 246 quoted above. They refer solely to cases of attachment, i. e., where a seizure is made in the hands of a third person *before judgment*.

It is easy to see that there is an essential difference between garnishment before and after judgment. See Marquez vs. Le Blanc, 29 A., p. 203, where this difference is discussed.

The Code nowhere provides how the answers of a garnishee shall be traversed or disproved.

It was held in a very early case, Rockwell vs. Smith, 1 La. 229, that although no such provision was made, he was entitled to notice in some form.

From the time of the passage of the Act of 1839, above referred to, the mode of traverse has been a rule to show cause why a judgment should not go against him for the amount of the plaintiff's judgment.

Okey vs. Miss. and Ala. R. R. Co., 13 La. 569;
Florance vs. York, 2 A. 995;
Dickson vs. Morgan, 6 A. 562;
Same vs. Same, 7 A. 490;
McDowell vs. Crook, 10 A. 31;
Ferguson vs. Murphy, Ib. 53;
Gatey vs. Franklin Ins. Co., 12 A. 272;
Cater vs. Morrell, 14 A. 376;
Barnes vs. Wayland, Ib. 791;
Marks vs. Reinberg, 16 A. 348;
Bell vs. Short, 25 A. 312;
Denouvion vs. McNight, 26 A. 74;
Foulhouze vs. Gaines, Ib. 84;
Dupervis vs. Halliday, 29 A. 133;
Hennen vs. Forget, Ib. 381;
Flash vs. Norris, Ib. 93;

Maduel, Ex., vs. Mousseau, 28 A. 671;
Ivens vs. Johnson, 30 A. 249;
Garcia Y Leon vs. La. Mut. Ins. Co., 31 A. 546.

So firmly had this practice been settled that it was recognized and legalized by the first section of Act No. 27, of the Extra Session of 1877, which provides as follows:

"That hereafter, in all cases where plaintiff desires to disprove or traverse the answers to interrogatories propounded to a garnishee under a writ of attachment or of *fieri facias*, he shall, within twenty judicial days after said garnishee shall have filed his said answer, *file a rule in court*, or institute other proceedings against said garnishee for the purpose aforesaid, and upon the failure of said plaintiff *to file a rule*, or institute other proceedings, as aforesaid, any property, rights, or credits in the hands of said garnishee, shall, by the mere fact of said failure, be considered as released from seizure under said writ of attachment, or *fieri facias*," etc.

In response to this rule to show cause, the garnishee was at liberty to go to trial without answer.

Okey vs. Miss. and Ala. R. R. Co., *supra;*
Flash vs. Norris, *supra.*

He could answer, and demand a jury trial.

Denouvion vs. McKnight, *supra;*
Foulhouze vs. Gaines, *supra.*

As seen by the other cases, he could set up his defenses by way of plea. But it was settled at an early period that all objections to the mode of procedure, or to the vagueness of the traverse, must be specially pleaded *in limine litis.*

Florance vs. Yorke, *supra.*

If he failed to answer the interrogatories in garnishment they were taken *pro confessis* and judgment was rendered against him immediately, without the formality of a default, or of any rule to show cause.

Parmely vs. Bradbury, 13 L. 351;
Sturges vs. Kendall, 2 A. 565;
Poole vs. Brooks, 12 R. 484;
Landry vs. Dickson, 7 A. 241;
Elder vs. Rogers, 11 A. 606.

If he answered and *confessed*, he was ordered, as provided in Art. 246 *supra*, to pay to the Sheriff. If he answered evasively or denied, a rule was taken upon him to shew cause why he should not pay the plaintiff's judgment, and if his answers were disproved on the trial of that rule, judgment went against him in favor of the plaintiff immediately.

No provision of law, expressed or implied, ever required that the defendant in execution should be made a party by citation to the proceedings against a garnishee *after judgment*. He was already a party as defendant in execution, and was, of course, served by the sheriff with the notice of the seizure made in the hands of the garnishee.

There is no case on record where any such thing was ever done or required to be done.

Neither is there any case on record where any other issue was made on a trial with a garnishee, except that on the traverse to his answers.

Apply these unquestionable principles to the record, and what do we find:

1st. A petition setting forth the judgment against the defendant in execution, the amount thereof, the issuance of the writ of *fi. fa.* thereunder, the belief of indebtedness by the garnishee, the seizure that had been made in his hands under the writ, and closing with a prayer that the garnishee be cited and ordered to answer, under oath, the annexed interrogatories, and that after due proceedings that a decree might go against the garnishee for the amount of the judgment, interest and costs.

2d. The interrogatories annexed to this petition.

3d. The order of the court directing that the company be made garnishee, and be ordered to answer as prayed for.

4th. The citation in garnishment, with due return of service.

5th. The answer of the garnishee within the time named;

6th. The traverse to the answers, both *in law and in fact*, suggesting that those answers *are false and untrue*, and that the garnishee is indebted unto the defendant in execution in a much larger sum than that admitted, and ruling the garnishee to shew cause, on a day fixed by the court, why judgment should not be rendered against him for the amount due plaintiff by the defendant in execution.

7th. *The appearance of the garnishee on the day fixed, and shewing cause by pleading the statute of limitations.*

8th. The trial before a jury of the issues thus made in due form of law, *without objection or exception of any kind.*

9th. The verdict of the jury in due form of law on the issues thus presented.

10th. The judgment properly and legally entered on said verdict.

If the proceedings in this case are irregular, informal and void to any extent, or to such an extent that *even a verdict cannot cure them*, then I can safely say that there never has been a valid garnishment proceeding in the United States Circuit Court for the District of Louisiana.

These proceedings were had in the court below on blank printed forms which have been in use in that court, without question, for more than forty years.

The 2d, 3d, 4th, 5th, 6th and 7th grounds, stated above, may be disposed of together.

In the first place, all such supposed irregularities, even if they existed in law or in fact, were cured by the voluntary appearance and answer of the garnishee.

All questions as to the irregularity of the process by which a party is brought into court, are waived by appearing, pleading or answering.

Creighton vs. Kerr, 20 Wall. 12;
U. S. vs. Yates, 6 How. 605;
Dyson vs. Brandt, 9 Martin, 493;
De Buys vs. Johnson, 4th N. S. 286;
Rowlett vs. Shepard, 4th La. 91;
Livingston vs. Dick, 1st A. 323;
City vs. Hall, 21st A. 438;
City vs. Walker, 23d A. 803;
Heard vs. Patton, 27th A. 542;
Nicholson vs. Jennings, Ib. 432.

All complaints as to non-joinder of parties are dilatory matters which must be plead *in limine litis*, and cannot be urged if not so plead.

Code of Practice, Art. 333;
Pascal vs. Ducros, 8 R. 112;
Stewart, Ex., vs. Scudder, 10 A. 216;
Tanner vs. King, Ib. 485;
Edwards vs. Smith, Ib. 536;
Brewer vs. Cook, 11 A. 627;
Dunbar, Ad., vs. Murphy, Ib. 713.

No error as to a matter in abatement can be urged in this court.

U. S. Rev. Stat. § 1011.

In the second place, they were cured by going to trial before the jury without objection. *Consensus tollit errorem.*

In the third place, they were cured by the verdict.

"No *summons*, writ, declaration, return, process, *judgment*, or other proceedings in civil causes, in any court of the United States, shall be abated, *arrested*, quashed *or reversed* for any *defect or want of form;* but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, *without regarding any such defect or want of form*, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof," etc.

U. S. Rev. Stat. § 954.

In the fourth place, the statements as to absence of a formal issue are untrue in point of fact, and bad in point of law.

The answers of the garnishee were traversed as the law of Louisiana provided, and the garnishee *joined formal issue on the traverse by his plea of prescription.*

The 8th ground is disposed of in a few words.

In the first place, the record discloses no facts to show that the debt due by the garnishee to the defendant is a part of the municipal revenues.

In the second place, even if it did, the garnishee is a mere stakeholder, and has no right or authority to contest such a question.

Kimball vs. Plant, 14 La. 514;
Featherston vs. Compton, 3 A. 380;
Brodie vs. Firemen's Ins. Co., 8 R 244;
Campbell vs. Meyers. 16 A. 362;
Citizens' Bank vs. Payne & Gilman. 21 A. 383;

In the third place, the stipulation in the record shows that the garnishee was, by agreement between the plaintiff and the defendant in execution, to pay this fund into court, subject to the rights of all parties concerned, and this agreement was embodied in the judgment against the garnishee.

The 9th ground, that a corporation, or non-sentient being

cannot be garnisheed, is such utter and abject nonsense as to be unworthy of discussion.

The 10th ground has been disposed of with the 1st.

I have gone at this length over the grounds of this so-called motion in arrest of judgment, which have been substantially reproduced in the assignment of errors, merely for the purpose of making it clear to the court that this writ of error was taken for delay only, and that the defendant in error should have damages awarded to him, as he has in his motion prayed for.

Repectfully submitted,

E. HOWARD McCALEB, A. H. Brice

Attorneys for Defendant in Error.

SUPREME COURT U.S.
FILED
JAMES H. McKENNEY, Clerk.
114-654

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART AND J. R. G. PITKIN, DEFENANTS IN ERROR.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO VACATE SUPERSEDEAS.

E. HOWARD McCALEB,
Attorney for Defendants in Error.

A. W. Hyatt, Print, 73 Camp St. N. O.—2365

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART AND J. R. G. PITKIN, DEFENANTS IN ERROR.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO VACATE SUPERSEDEAS.

STATEMENT OF CASE.

On March 3d, 1882, Judah Hart obtained, in the Circuit Court, a judgment at law against the city of New Orleans for the sum of $121,697 00 (R. p. 34). A writ of *fi. fa.* having issued on this judgment, and certain property and funds being levied upon thereunder, the city of New Orleans, on April 15th, 1882, filed a motion to quash both the *fi. fa.* and the levy (R. p. 46). Issue was joined on the averments of this motion by a formal answer (R. pp. 50–51). A jury was waived and the cause submitted to the court (p. 50). On May 27th the court found the law and the facts generally in favor of the plaintiff in execution, and entered

affirm. If either of these last motions are granted, it will be unnecessary to pass on the present motion.

If those motions should be denied, then the present motion will have to be considered.

In the event of its consideration by the court, I submit that it should be granted.

Respectfully,

E. HOWARD McCALEB,

Attorney for Defendants in Error.

per A. G. Brice

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

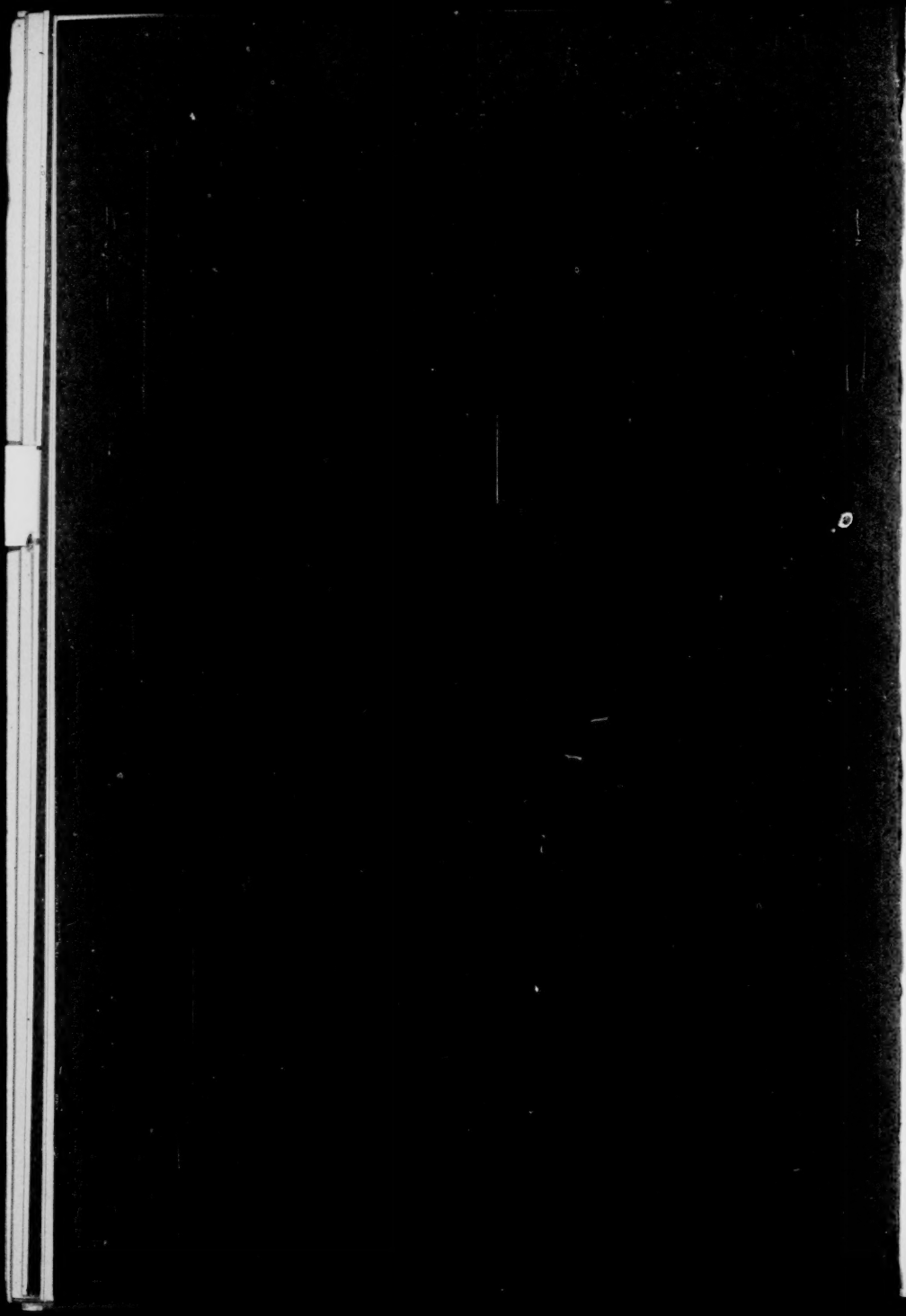
JUDAH HART AND J. R. G. PITKIN, DEFENDANTS IN ERROR.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR, ON MOTION TO DISMISS AND AFFIRM.

E. H. FARRAR,
E. HOWARD McCALEB,
Attorneys for Defendants in Error.

A. W. Hyatt, Print, 73 Camp St. N. O.—2506



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART AND J. R. G. PITKIN, DEFENDANTS IN ERROR.

Error to the Fifth Circuit and Eastern District of Louisiana.

BRIEF OF DEFENDANTS IN ERROR, ON MOTION TO DISMISS AND AFFIRM.

STATEMENT OF CASE.

Judah Hart, one of the defendants in error, having obtained a judgment at law against the City of New Orleans for a large sum of money, caused a *fi. fa.* to issue thereunder, and caused J. R. G. Pitkin, Marshal of the District, to levy upon certain squares of ground, and warehouses, the property of the defendant, and upon certain funds, due to the defendant, in the hands of the Canal and Claiborne Street Railroad Company, and the New Orleans Sugar Shed Company.

Thereupon, on April 15th, 1882, the City filed a motion to quash both the fi. fa., and the levy made under it (p. 46).

The grounds upon which the motion to quash the writ is based, are:

1st. Because the judgment is not such an absolute judgment as can be enforced by the seizure and sale of property.

2d. Because execution issued thereon improvidently, for the reason that, by virtue of the provisions of Act No. 5, of the Extra Session of the Legislature of Louisiana, of 1870 judgments against the City of New Orleans cannot be executed by fi. fa., and that such act is binding on plaintiff, because, as a matter of fact, the contract and claims, merged in the judgment, arose and were acquired by plaintiff, since the passage of the same.

3d. That, as a matter of fact, the judgment had not been registered under the provision of the said Act No. 5, of 1870.

The grounds upon which it is sought to quash the levy under the writ are:

1st. That the squares of ground seized form part of the public levee, quay or port of New Orleans, are a *locus publicus*, and therefore out of commerce, and not liable to seizure.

2d. That the funds seized are part of the public revenue of the city, and as such are not liable to seizure.

On this motion, the plaintiff in execution joined issue, averring: "That as to the right of the plaintiff to issue execution on the absolute judgment obtained in this cause, all the matters and things averred in the said motion were in issue on the trial of this cause on the merits, and are barred by the judgment.

And further answering, this plaintiff denies all and singular, the allegations in the said motion, except those herein specially admitted.

He specially denies that any of the property or funds herein seized are public property, and not liable to seizure; but, on the contrary, he avers that all of the said property and funds are liable to seizure"—pp. 50-1.

Under the provisions of the fourth section of the Act of Con-

gress, of March 3, 1865 (13 Stat. at Large, 501), now Sections 649 and 700 of the Revised Statutes, the parties filed a written stipulation waiving a jury, and submitting the matters of law and fact raised in the motion and answer to the court—p. 50.

The matter was heard before both the District and the Circuit Judges sitting together—p 57.

It does not appear that there were any "rulings by the court during the progress of the trial;" and, if there were, no bills of exception were taken by either party.

On Saturday, May 27th, the motion was denied—pp. 61–62, and the following decree was entered and signed in due course on the second day of June—p. 62.

"This cause came on to be heard on the motion of the defendant, the City of New Orleans, filed April 15th, 1882, to quash the *fi. fa.* herein issued, and to quash the levy thereunder made on the sugar-shed warehouses and certain railroad bonus funds, and was argued by counsel; and the parties having filed a stipulation in writing, waiving the intervention of a jury, and submitted the cause to the court upon the issues of fact as well as of law, and the court having considered the evidence, and being fully advised in the premises, *finds both the issues of fact and of law raised by the pleadings in favor of Judah Hart, the defendant in the rule and motion.*

"It is ordered, adjudged and decreed that the said motion of the City of New Orleans be denied, and that her demand to quash the execution and the levy thereunder, made on the said sugar-shed warehouses, and the said bonus funds, be rejected with costs."

On June 12th, the city filed a petition for a writ of error to this judgment, which was allowed—pp. 62-3.

On the 29th of June, the city lodged her writ (p. 73); filed and obtained the approval of a bond (p. 63); and obtained the

signing and issuance of the citations in error, which were served on the 8th day of July—pp. 75-6.

As appears by the original bond thus filed, which has been sent up here for the purposes of this motion, under the provisions of section 4 of rule No. 8. of the general rules of this court, the corporate seal of the City of New Orleans is not affixed to it. Indeed, the seal is nothing but a printed bracket with the word "seal" enclosed in it.

On the 22d day of July, one month and twenty days after the judgment above quoted had been entered and signed, fourteen days after the service of the citations in error, and days after the close of the term of the court, at which the said judgment had been rendered, the plaintiff in error, evidently awaking to the fact that there was nothing in the record upon which error could be assigned, applied to the Circuit Judge for a special finding of the facts, hoping evidently to substitute this for the general finding made on May 27th, and signed on June 2d.

Doubting his power *in* the then condition of the case to make any such finding, and wishing to reserve the rights of the defendant in error, the Judge made the special finding and entered upon it this order—p. 67

"And it is ordered that the clerk file the foregoing with the record of the case, as the statement of facts found therein, of the date that the same comes to his office, but that the same shall have (*so far as the authority of the Circuit Judge may go in the present state of the case*) the same effect as if filed on the day the judgment was rendered."

The statement was received and filed by the clerk on July 22d, 1882 (p. 65).

POINTS OF LAW ON MOTION TO DISMISS.

Motion is now made to dismiss this writ of error on two grounds:

1st. *Because the bond, purporting to be executed by the City of New Orleans, plaintiff in error, a municipal corporation, organized under a special statute of the State of Louisiana, is illegal and informal, for the reason that the same does not appear to have been executed with due corporate authority, and is not sealed with the official seal of the corporation.*

2d. *Because a writ of error will not lie from this court to the judgment of a Circuit Court, refusing to quash on motion a fi. fa. and the levy thereunder made.*

ARGUMENT ON MOTION TO DISMISS.

1st. The bond, purporting to have been executed by the City of New Orleans, should have been sealed with the official seal of the corporation. Without such official seal there is no evidence that this bond, this solemn act (as we civilians call it), was executed with the corporate authority and consent. The city has such a seal. Her charter provides for it. She is (or was at the time this bond was given) organized by a special statute, being Act No. 7, of the Acts of the Extra Session of 1870, the second section of which provides:

"That all that portion of the parish of Orleans, situated, etc., and all the inhabitants thereof, shall be a body corporate, to be known by the name of the City of New Orleans, and by that name they and their successors shall be known in law, and shall be capable of suing and being sued, and of prosecuting and defending in all courts and in all actions and matters whatsoever; and SHALL have *a common seal*, and may alter and change the same at pleasure," etc.

Acts La., Ex. Sess., 1870, p. 30.

However great, in modern times, the relaxation of the general rule that a corporation cannot be bound except by an act under its seal, has been, both in England and in this country, the rule has never been modified as regards *municipal corpora-*

tions, and especially as regards those formal acts required to be executed by law, such as deeds to land, bonds, and the like.

Wharton's Law of Evidence, § 694;
Dillon on Municipal Corporations, § 132;
Kenzie vs. Chicago, 2 Scam. 188;
States vs. Allis, 18 Ark. 269;
Henderson vs. R. U. S. Nav. Co., 32 E. L. & Eq. 172.
Ludlow vs. Charlton, 6 Mees. & W. 820.

It is claimed that this absence of evidence that the City of New Orleans ever executed this bond, is of no moment, because, under the practice in the Supreme Court of Louisiana, it is not necessary for the appellant to sign the bond.

Such local practice can be of no avail here, where the acts of Congress, and not the acts of the Legislature of Louisiana govern.

2d. It has long been a settled doctrine in this court that a writ of error will not lie upon the refusal of a motion to quash. Such a motion is considered as addressed to the discretion of the court, and is not regarded as a final judgment within the meaning of § 691, Revised Statutes.

This point was first decided in Mountz et al vs. Hodgson & Thompson, 4 Cranch, pp. 324–7, where the court seems to have dismissed the writ of its own motion.

It was decided again in Boyle vs. Zacharie & Turner, 6th Peters, 648.

In Evans vs. Gee, 14 Peters, p. 1, Mr. Justice Catron said:

"It is the settled doctrine here that a writ of error does not lie upon the refusal of a motion to quash."

See, also, Amis vs. Smith, 16th Peters, 303, and McCargo vs. Chapman, 20 Howard, 555.

But it is claimed that the writ lies, in this case, because the

object of the motion was not only to quash the fi. fa., but also *to quash the levy made under it.*

In this connection it is claimed that the motion, in so far as it seeks to quash the levy upon the property seized raises the issue of the seizability, *vel non*, of such property; that this issue is not one addressed to the discretion of the court; that it could have been raised by a bill in equity, or by a third opposition in due form of law; and that, *in substance*, this motion to quash is equivalent to such formal proceeding, and the judgment upon it is, therefore, *in substance*, a final judgment, to which a writ will lie. All of these premises may be, and, indeed, I think are, true, and yet it would not follow that a writ of error would lie to such a judgment, because parties may, if they choose, submit to a *nisi preverse* judge a matter of substanee in such a form as to preclude themselves from taking the matter before an appellate court.

A good illustration of this principle is found in those law cases where a jury was waived and the cause submitted to the court prior to the passage of the act of March 3d, 1865. No review of such causes could be had on writ of error.

Campbell vs. Boyreau, 21 H. 223;
Guild vs. Fronti,n 18 H. 135;
Suydam vs. Williamson, 20 H. 432;
Kelsey vs Forsyth, 21 H. 85;
Flanders vs. Tweed, 9 Wall. 429.

In such cases, no matter what the substance of the controversy was, it was held that the parties had, by the form of the submission, constituted the judge a sort of judicial arbitrator, to whose judgment, final and conclusive though it might be between the parties, a writ of error would not lie.

So in this case. If a writ will not lie to a motion to quash, it is because *substantial matters* submitted *in that form* are submitted to the discretion of the Judge, who is thus constituted a sort of judicial arbitrator.

I submit that from this point of view there is no difference between a motion to quash a fi. fa., and a motion to quash a levy under a fi. fa., and that the writ of error in this cause should be dismissed.

POINTS OF LAW ON MOTION TO AFFIRM.

In the event that the above motion to dismiss should be denied, motion is made to affirm the judgment to which the writ of error has been taken on the ground:

"*That it is manifest that the writ was taken for delay only, as there is nothing whatever in the record on which error can be assigned, there being no question arising on the pleadings, no bill of exceptions, no authorized statement of facts, and no special verdict, or special finding of facts, and, indeed, nothing which can be examined in this court on a writ of error.*"

ARGUMENT.

Leaving out of view the special finding of facts, made and filed as above stated, on July 22d, 1882, one month and twenty days after the signature of the judgment comprising a general finding of the facts, and fourteen days after the service of the citations in error, the record brought up here by this writ consists of the motion to quash (p. 46); the stipulation to waive jury and submit the cause to the court (p. 30); the answer (pp. 50-51); the extract from the minutes showing the trial and judgment (pp. 57, 61); the final decree (p. 62); the petition and order for the writ of error (pp. 62-3); the bond for the writ filed June 29th, (p. 63); the writ of error lodged June 29th, 1882 (p. 73); and the citation in error signed June 29th and served July 8th, 1882 (pp. 75-6).

If, therefore, this court can take no notice of that so-called statement of facts, then there is nothing in this record upon which error can be, *or is*, assigned, and the judgment below must be affirmed.

Cooper vs. Omohundro, 19 W. 65;
Crews vs. Brewer, Ib. 70;
Insurance Company vs. Folsom, 18 W. 249;
Richmond vs. Smith, 15 W. 437–8;
Dirst vs. Morris, 14 W. 485;
Generes vs. Campbell, 11 W. 193;
Coddington vs. Richardson, 10 W. 516;
Avendano vs. Gay, 8 W. 376;
Generes vs. Bonnemer, 7 W. 564;
Norris vs. Jackson, 9 W. 125.

That the so-called statement of facts is an utter nullity, and beyond the pale of recognition in this court, is clear.

It was made at a time when the case was no longer within the jurisdiction or under the control of the Circuit Court. The service of the writ of error had moved the case into this jurisdiction.

Generes vs. Bonnemer and Avendano vs. Gay (*supra*) are directly in point.

In the first quoted case Mr. Justice Miller said:

"To permit the Judge to make a statement of facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record, entirely in the power of the Judge, without hearing and without remedy. The statement of facts filed without consent of parties *must be treated as a nullity.*"

In the second quoted case the same learned Judge said:

"Counsel attempts to impugn the judgment, as not being supported by the facts of the case, and relies on what purports to be a statement of the facts found by the court. But the statement is filed in the court several days after the issue and service of the writ of error in this case, and is therefore a nullity, as we decided in the case of Generes vs. Bonnemer."

In Kearney vs. Case, 12 W. 275, this court refused to notice a statement of facts filed under similar circumstances, *even by consent of counsel;* and this ruling was affirmed in Bethell vs. Mathews, 13 W., p. 1.

In the case at bar, not only was there no consent, but there was resistance on the part of the counsel for defendant in error to the making and filing of this statement of facts, after the service of the writ of error. This resistance resulted in the order quoted above, made by the judge upon the statement, which reserves the question of his power to make it at that time.

In view of these facts and the above authorities, it is manifest that this statement of facts cannot be noticed.

It would, therefore, be a work of supererogation to discuss whether the facts there found are sufficient to support the judgment.

The writ was plainly taken for delay only. There is no error in the record, and the judgment must be affirmed.

Respectfully submitted,

E. H. FARRAR.
E. HOWARD McCALEB,
Attorneys for Defendants in Error

14-654

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

Brief in behalf of Plaintiff in Error on Defendant's motion to dismiss and affirm.

CHAS. F. BUCK,
City Attorney.
B. F. JONAS,
Of Counsel.

A. W. Hyatt, Print, 73 Camp St. N. O.—2765

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

Brief in behalf of Plaintiff in Error on Defendant's motion to dismiss and affirm.

Judah Hart obtained a judgment against the city of New Orleans for the sum of $121,697. The judgment contains the following qualification:

"It is further ordered, adjudged and decreed, by virtue of "the acquiescence of the plaintiff, and by his consent, in the "nature of a remittitur, for the purpose of avoiding a question "raised on the motion for a new trial, that in case said plaintiff "shall hereafter apply for a mandamus to compel the levy of "taxes to pay the said amount herein decreed, or any part "thereof, he shall be held bound by all the limitations, if any, "as to the extent of the taxing power of the said defendant, "which were in force at the time the contracts herein sued on "were made between the city and the transferrors of the plaintiff, "i. e., that the plaintiff shall not have the right, by mandamus, "to compel the levy and collection of taxes in any one year at a

"greater rate than that which was binding upon the defendant "at the time the said contracts were made."

From this judgment the city of New Orleans prosecutes a writ of error to this Honorable Court, on a bond for two hundred and fifty dollars to secure costs. Sec. 1007, U. S. R. S.; see Petition and Order, T, pp. 36, 37; Bond. Trans., p. 67.

Her inability to find sureties for a bond in an amount sufficient to effect a stay of execution, is notorious, and is the reason why no such bond was given.

Plaintiff caused execution to issue, and seized the property and rights described in the "motion to quash execution," etc., Record, p. 46.

This motion was decided adversely to the city, and a writ of error is prosecuted from the judgment thereon. A regular and *final* judgment was rendered on this motion,—entered on May 27th, 1882—and after the expiration of three judicial days on June 2d, 1882, duly signed by the Circuit Judge.

The order on the petition for writ of error was allowed as stated in the brief of counsel for defendant in writ (brief, p. 2), on motion to vacate *supersedeas*.

Counsel for defendant in error move this Honorable Court:

FIRST. *To dismis the writ of error from the judgment quashing execution, etc.*

SECOND. *To* AFFIRM *that judgment.*

THIRD. *In event of refusal of both the foregoing, to vacate* SUPERSEDEAS.

I.

ON MOTION TO DISMISS.

The motion to *dismiss* is based on the following grounds:

1st. Because the bond, purporting to be executed by the City of New Orleans, plaintiff in error, a municipal corporation, organized

under a special statute of the State of Louisiana, is illegal and informal, for the reason that the same does not appear to have been executed with due corporate authority, and is not sealed with the official seal of the corporation.

2d. Because a writ of error will not lie from this Court to the judgment of a Circuit Court, refusing to quash on motion a fi. fa. and the levy thereunder made.

First.—On the first point, we can, with difficulty, believe our learned friends on the other side to be serious. In the first place, the *execution* of the bond is a matter of which, it seems to us, this Honorable Court will take no cognizance at all. The learned Judge of the Circuit Court duly accepted and approved the bond, according to the rules of practice, and his action in this regard is final.

The "practice in the Supreme Court of Louisiana," adverted to in this regard, is not exceptional. That Court has decided, simply, that an appeal bond need not be signed by the appellant at all, because he is bound without his signature. His liability springs from his *acts*, and exists independently of the bond. The City of New Orleans is defendant in this cause. She is forced to appear. Must there be a resolution or ordinance of the Council, duly attested, *under seal*, etc., to authorize each successive step in the litigation? Unless it is necessary that counsel for the city should exhibit such special instructions, by such evidence, to authorize him to apply in the name of the city for a writ of error, it is not necessary to *prove* the execution of the bond by such formality.

If the city is cast in these proceedings, she could never be heard to plead that they were unauthorized, or *ultra vires:* the sureties could not set up such defense. Principal and surety are bound on this bond, beyond any chance; and that is the conclusive test of its validity. Even if the point, as made, were well taken, and this Honorable Court reached the conclusion that there was irregularity in the bond, in respect to its authenticity,

and that the "corporate authority" should appear under the "official seal" of the corporation, you would not, therefore, dismiss the writ of error, but in the exercise of that equitable power, which is part of the jurisprudence of the Court, offer an opportunity to supply the defect.

Second.—It is contended that "a *writ of error* does not lie to "the judgment of a Circuit Court refusing a motion to quash a "*fi. fa.*, and the levy thereunder made."

It is urged that such a motion addresses itself to the *discretion* of the Court, the exercise of which does not constitute a "*final* judgment," in the meaning of sec. 691, Revised Statutes.

The motion itself, and the judgment as rendered after regular trial, with written stipulation in the record, to waive jury, to all of which reference has been made, furnish a conclusive answer to the proposition that the final disposition of the matters presented by the motion to quash, was a mere incidental exercise of ordinary judicial discretion, not reviewable by a higher court.

Counsel for defendant in error virtually admits (see their brief, page 7), that there is something more in this motion than a mere formality within the "discretion" of the circuit judge.

But it is contended that, by taking the "rule to quash." the city presented a "matter of substance in such a form" as to preclude herself from taking it before an appellate court for review. The *motion* was made on the authority of the case of Van Norden vs. Morton, 99 U. S., 378, and rule of practice there indicated is confirmed in the later recent case of City of New Orleans vs. Jno. A. Morris et als., where a bill in equity was sustained on the ground that the property seized (the waterworks-stock) was held by the city as trustee; under ordinary circumstances motion to quash would have been the proper remedy. No objection was made to the form of proceeding.

The learned counsel were not satisfied with the ordinary and usual entry on the minutes of the court discharging the rule.

They took care that a regular judgment should be entered, which was done and *signed* with all the solemnity *of* a final judgment.

Indeed, there can be no doubt that this motion to quash presented matters which are not "addressed to the discretion of the court," but substantial issues of law and fact which, under previously accepted practice, would have formed the "cause" for a bill in equity. If such proceeding had been attempted after the rule was discharged, and the judgment entered and *signed*, which we have in this record, the exception or demurrer of *res adjudicata* would have been speedily interposed.

A *final* judgment, involving rights exceeding ten thousand dollars in value, has been rendered. The city is concluded by that judgment if she allows it to stand. She cannot revive the controversy in any other form of proceeding. The right to have a judgment reviewed by higher courts is a favored one, and courts of justice will extend rather than curtail it. With what grace does it lie in the mouth of defendant in error to say that the city had precluded herself "from taking the matter to an appellate court?" Had *he* committed himself to abide the decree of the circuit judge, as a finality? Did he object to the form of proceeding? No. He joined issue, by formal answer, with the evident purpose, since he must meet the questions in some way, to do it in this proceeding rather than in a chancery suit. Rules of practice are intended to guard rights, not destroy them. But if writs of error can be dismissed upon such grounds as those herein urged, then these rules are snares to entrap the unwary, not safeguards to protect the right. This high tribunal sits to *hear* causes, not to dismiss them.

We respectfully submit that the motion to dismiss should be denied.

II.

Failing his motion to dismiss, defendant moves to AFFIRM!

This motion is taken on the following ground:

"*That it is manifest that the writ was taken for delay only, as there is nothing whatever in the record on which error can be assigned, there being no question arising on the pleadings, no bill of exceptions, no authorized statement of facts, and no special verdict, or special finding of facts, and, indeed, nothing which can be examined in this count on a writ of error.*"

(Counsel's brief, page 8).

The *gravamen* of this motion, in this and in all similar motions is, that the writ of error was 'taken for delay"—"has, therefore, no serious merit, and must be dismissed." It is the closing complaint of counsel for mover. (His brief, page 10).

We submit, respectfully, first and foremost, that any and every suggestion that the writ of error to the judgment on the motion to quash was *taken for delay*, or, that there is not, from beginning to end, a serious, bona fide contest on every point urged, with the evident object to preserve every possible point for review by this tribunal, is negatived by every line of the record which contains the proceedings had in this cause.

We submit, further, *that there is in the record and* "AUTHORIZED STATEMENT OF FACTS," *or* "SPECIAL FINDING OF FACTS," *an assignment of errors thereon, and error assigned and assignable on the face of the papers.*

See "*Statement of Facts found by the court, on motion to quash levy and execution.*" Record, p. 65.

Also, errors assigned on the rulings of the court thereon, and on matters presented on the face of the record. Record, p. 74.

Also, Record, page 70, Assignment of Error (2d) in the ruling of the court on the *motion to remand* to the State court.

See said motion to remand. Record, page 24.

It is contended that this "statement of facts" is an "utter nullity," because it was signed by the judge, and filed after the

writ of error was perfected. And it is asserted that it was signed, notwithstanding "resistance" on the part of defendant in error, which "*resistance*" resulted in the order, as found in record, reserving "the question of the judge's power to make it at that time." There was quite another reason for the reservation, and also a reason why the learned judge ordered that the statement, as far as *he* could control it, should have "the same effect as if filed on the day the judgment was rendered." Why should the learned judge go out of his way to make the order that the "statement" should date back to the date of the judgment, unless there was a special reason for it?

Would he, under ordinary circumstances, have the right to do it? The very fact that he made it, and ordered it filed *nunc pro tunc*, as of the date of the judgment in the face of "resistance," argues that there must have been just ground for his action. The writer of this brief respectfully refers this Honorable Court to a short appendix hereto annexed, as explanation for the making and filing of this statement of facts as it appears in the record.

ARGUMENT.

Conceded that there is nothing in the record "upon which error can be or *is* assigned," the motion to *affirm* must be granted. In connection with the merit and validity of the "statement of facts" we call your Honors' attention to the appendix hereinbefore referred to. We submit, however, that the order of the learned judge *a quo*, that it be *filed* as of "*date of the judgment*," is conclusive. The "statement" itself bears no date, but the order is that the clerk file it of the date the same comes to his office, but to have the effect, as far as the authority of the Circuit Judge then permitted, as if "FILED *on the day the judgment was rendered.*" The letter of his Honor, the Circuit Judge, recited in the appendix, explains this order, and under all circumstances shows that counsel had done everything that is usual, if not everything that was possible, to make up and preserve a record on which this Court can act.

The record shows a "written stipulation" to waive jury (page 50). There is, therefore, a compliance with the requirements of the Statute of March 3 1865.

The general purport of the decisions relied on by defendant is, that this court will not review a case at all where there was not a trial by jury, unless a written stipulation to waive the jury appear in the record. So held explicitly in Kearney vs. Case, 12 Wall. 275. A stipulation that there shall be "special findings of fact," or a "statement of facts," is not necessary. That is matter of right on which either party may insist.

But conceding again that there is irregularity in the filing of the statement of facts, this Honorable Court has established precedents which would warrant a *remanding* of the cause, that no substantial right may be lost. The case of Flanders vs. Tweed, 9th Wall. 424, was remanded on much weaker showing than appears in this record. From the statement of the case, in the report, it would appear that there was no statement of facts or assignment of errors at all. The court holds that upon the strict rules of practice the writ of error should have been dismissed, but says that the court exercises its powers and discretion according to the *circumstances* of the particular case, and if these warrant a relaxation of the strict rules, in the interest of substantial justice, the court will make an exceptional ruling.

This court said, in that case, that the parties "*supposed that* "*they had made up a case, according to the practice of Louisiana,* "*from the finding of the facts by the court, that would entitle them to* "*a re-examination of it here; but as the court did not make it up* AND "FILE IT, AS OF THE DATE OF THE TRIAL AND JUDGMENT, *it can-* "*not be regarded as part of the record, and under the circumstances,* "*the case being an important one,* AND INTENDED *to be carried up here* "*for re-examination, we shall reverse the judgment for* MISTRIAL *and* "REMAND it to the court below."

It will be noticed too that the court here, by inference at least, decides that if the judge had made and filed a statement

of facts, *not on the day of trial and judgment*, but "AS *of the date of trial and judgment* it would have been held sufficient."

The same grace (of remanding) was accorded under similar circumstances in the case of Graham vs. Bayne, 18 H. 60. And in Guild vs. Frontin, 18 H. 135, this court, while affirming a "general rule," said :

"If the verdict do not find all the issues, or the agreed statement in the nature of a special verdict be imperfect or incomplete, this court may order a *venire de novo*, because of the mistrial, as in the case of Graham vs. Bayne."

We submit therefore, that the "statement of facts," in this record, is properly there as a basis for the action of this court, in review of the judgment to be examined.

If not, then, in view of the fact that the "imperfectness" is attributable to no fault, or laches of the plaintiff in error, or her counsel, it is respectfully prayed that this Honorable Court make such ruling as the justice of the situation and the circumstances of the case require or suggest.

Error assigned, irrespective and independent of the "Statement of Facts."

There appears error, assigned and assignable, on the face of the pleadings.

1st. Did the Circuit Court acquire jurisdiction by the proceedings for removal from the State Court?

This point is expressly raised by the motion to remand, reserved throughout, and assigned as error. Trans. p. 70.

2d. The judgment, on its face, is a qualified and conditional one, and not enforcable by the writ of *fi. fa.*

3d. The pleadings raise the question, as matter of law, whether under Act No. 5, of the acts of the General Assembly of Louisiana, of which the Federal courts will take cognizance, the writ of *fi. fa.* can issue against the city of New Orleans.

These points are called to the attention of the court, and submitted, except the first, without discussion. Whether they are well taken or not, is not to the purpose now. The only question is, does the record present them for review to this court, independent of the "statement of facts." If so, there is error assigned on matters of importance, which should not be disposed of in the summary manner attempted by defendant in error.

The *first* point, error in the refusal to remand, is certainly a vital one, and though it arose *in limine*, and is not directly connected with the motion to quash, it is subject to discussion in any form and stage of the litigation, because it involves a question of jurisdiction. We might urge this, as the other points, in so far as this motion is concerned, not *on its merits*, but on the mere question whether the record presents it as matter for review. Whatever consideration your Honors may be disposed to give it, in connection with the issues now presented, will be facilitated by a brief statement of the pleadings under which it arises.

This suit was commenced by petition filed in the Civil District Court, parish of Orleans on the 4th day of November, 1881. Citation issued on same day, and was served same day on the City of New Orleans.

The claims which form the basis of demand are "non-negotiable," and of such a character that even in the hands of a plaintiff, citizen of a State, other than Louisiana, the Federal courts could not acquire jurisdiction.

What could not be done directly is attempted to be done indirectly. On the *fifth* of November, 1881, a petition is filed in the State court for removal of the cause under the section 639, subdivision 3, R. p. 22. The order for removal was allowed. The affidavit for removal was made by Judah Hart, plaintiff, and bears the following attestation :

"*Sworn to and subscribed before me this 25th day of* OCTOBER, *A. D., 1881.*

(Signed) "GEO. R. JAQUES,

"Commissioner of deeds for the State of Louisiana, in *New York. 252 Broadway.*"

Transcript, p. 22.

In the affidavit Judah Hart says, "that he *is* plaintiff in the case of Judah Hart vs. The City of New Orleans, No. 4414, Civil District Court," etc.

The affidavit is made in the State of New York, on the 25th of October; the suit is *filed* in Louisiana, on the 4th of November.

The transcript of the record was filed in the Circuit Court of the United States, on the 12th day of November. On the 15th of November, the city not having appeared, judgment *by default* was entered, and on the same day the motion to remand was filed.

It is contended that the "irregularity" (?) in the affidavit was cured by the omission to plead it before default.

A *default* in the practice of Louisiana, cuts off *dilatory* pleas: nothing else. No one will venture to dispute this proposition.

How then can it cut off a plea, which goes to the *jurisdiction* of the court?

The jurisdiction in this cause depends on the *proceeding for removal*—there is no original jurisdiction *ratione materiæ* in the Circuit Court. If, therefore, the proceedings for removal are defective, the Circuit Court is without jurisdiction, and all subsequent proceeding are null and void.

It remains only to be said that the dismissal of the suit or the affirmance of the judgment, answer no purpose of justice or equity. The main question remains still before your Honors. There is no motion or even suggestion that the writ of error from the *original* judgment, should be dismissed or affirmed. The

proceedings before you are on the execution of the judgment. Property sufficient in value to satisfy plaintiff's judgment is in the hands of the Marshal.

Plaintiff's rights, under the seizure, cannot be disturbed if the seizure is eventually maintained. But if the property under seizure is now sold, and the judgment on the merits should be in favor of the city, an irreparable injury may have been suffered by her.

We respectfully submit and pray, therefore,

1st. That the motions to dismiss and affirm be denied.

2d. Or if irregularities should be found in the record considering the nature and circumstances of the case, that this Honorable Court afford an opportunity to correct them.

CHAS. F. BUCK,
City Attorney.
B. F. JONAS,
Of Counsel.

ON MOTION TO VACATE SUPERSEDEAS.

The whole argument of mover, on this point, is obviously founded on a principle of Louisiana Practice, which recognizes two distinct kinds of appeals—the suspense and devolutive. And our courts have held that where one of these appeals has been *perfected*, and subsequently abandoned or lost through some fault attributable to the appellant, he cannot afterwards prosecute the other:—or it may be that it is assumed that when one appeal is perfected that the court below would not have authority to allow the other.

The Federal statutes make no distinction in *name*. A writ of error is allowed; it operates a stay of execution or not, according to performance of certain conditions. In this case a bond for $10,250 was to be filed within the sixty days, as provided by sec. 1007, U. S. Statutes. This bond, duly approved by the

judge, was filed *within* sixty days after the rendition of the judgment.

It is claimed that the Circuit Court had no jurisdiction after the citation issued; the statute expressly provides that the plaintiff in error, "having served his writ," may, if he desires "to stay execution," * * * "give the security required by law within sixty days after the rendition of such judgment."

The *order* for the writ had been allowed in due time; it authorized the writ of error on a bond for costs—the writ to operate a *supersedeas*, if a bond for $10,000 additional is given. The city, with difficulty, obtained this additional bond, and had it approved and filed within the sixty days. The judge *a quo* had not only jurisdiction, but *exclusive jurisdiction.* The authority of this Court does not arise until after the expiration of the *sixty days*. Sec. 1007, R. S.

Here, again, as in other matters in the cause, if extremes of technicality are invoked, we appeal to the power of this court to confirm, what even by admission of counsel for defendant it could do originally, if, indeed, it be true, that the Circuit Judge had no authority to accept the bond.

Opposition was made before the Circuit Judge, and briefs submitted to him. He exercised his authority with due deliberation, and we believe with correct result.

We pray that the motion to vacate *supersedeas* be denied.

Respectfully,

CHAS. F. BUCK,
City Attorney,
B. F. JONAS,
Of Counsel.

APPENDIX.

I respectfully submit to your Honors the following statement and affidavit, relative to the "*Statement of Facts.*"

Copy—Original Filed in the Clerk's Office.

The undersigned duly sworn, deposes and says, that when the motion to quash execution and levy under it, in the case of Judah Hart vs. The City of New Orleans, was called for trial, and the stipulation to "waive jury" was signed, he, affiant, then and there announced that he desired a statement of the facts to be made up, whether by the court or on agreement with counsel on the other side, to serve as a basis for assignment of error: that then and there, it was observed by court and counsel that as the main *facts* necessary to a decision of the questions presented would, probably, *as such*, not be disputed, counsel could easily come to an agreement; there was nothing said to the contrary by any one at the time, and affiant accepted this as an understanding that the facts of the case should be found by agreement or the court, for the purpose of making up the Record for this court.

The case was submitted to the court after oral and printed argument, and after the rendition and before the signing of the judgment affiant applied to the Circuit Judge for a statement of the facts Subsequent efforts, on affiant's part, to obtain the statement of facts are explained by the appended letter of the Hon. Don A. Pardee, Circuit Judge, which is embodied in full with certificate of Clerk, as a correct copy. When Mr. Farrar returned to this city, after his absence referred to by the Circuit Judge, at Baton Rouge, the undersigned submitted an outline to him, with the view of agreement on the facts, which was met by the following response from Mr. Farrar:

"NEW ORLEANS, July 12, 1882.

"Chs. F. Buck, Esq.:

"*Dear Sir:* I must refuse to sign the so-called statement of

" facts sent me by you in the case of Judah Hart vs. The City of " New Orleans, for the following reasons :

" 1st. There was no written stipulation filed in the case, " submitting the whole matter to the court. The court could have " found either a general or a special verdict. It found and signed " a general verdict.

" 2d. There was no agreement expressed or implied that the " counsel should draw up and sign any statement of facts.

" 3d. A writ of error having been taken and perfected, it is " no longer in the power of either the counsel or the court to " add to or take from the record.

" 4th. The proposed statement is not a proper finding of the " facts.

" 5th. It is erroneous and incomplete in many particulars." etc. * * * * * *

The original of this was at once sent by me to the Circuit Judge, who was absent from the city, with a statement containing my recollections on the entire subject. I believe that by the same mail opposing counsel sent objections to the allowance of any "Statement of Facts." The result was the "Statement" in the record, with the order thereon, and the reasons for the action of the court as expressed in the subjoined letter "A."

(Signed) C. F. BUCK.

Sworn to and subscribed before me, this 4th day of December, 1882.

(Signed) F. A. WOOLFLEY,
Clerk U. S. Circuit Court.

LETTER OF THE CIRCUIT JUDGE.

UNITED STATES CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
AT CHAMBERS,
WADSWORTH, Ohio, July 19, 1882.

Dear Sir—Enclosed find statement of facts in Hart vs. City, with order as to filing at the end.

My recollection is, that before the judgment was signed, Mr. Buck notified me that he desired a statement of facts. I told him that counsel could agree very easily, as it seemed to me. Shortly before I left Mr. Buck spoke to me again when Mr. Farrar was in Baton Rouge. I then told him counsel might agree, and that, under the circumstances, I would save him from all danger, except that caused by his own laches. I have, therefore, made a finding which he must take his chances on. I think it fair to both sides, allowing all points to be raised.

Show counsel on both sides this letter.

Very truly, etc.,

(Signed) DON A. PARDEE.

To F. A. WOOLFLEY, Esq.,
Clerk U. S. C. C., New Orleans.

U. S. CIRCUIT COURT.
EASTERN DISTRICT OF LOUISIANA,
CLERK'S OFFICE.

I certify that the letter copied on the reverse hereof is a true copy of the original letter of his Honor Don A. Pardee, transmitting the statement of facts in re Judah Hart vs. City of New Orleans, No. 9662 on the docket of this court, referred to in said letter.

[L. S.] Witness my hand and the seal of said court, at New Orleans, in said District, this 9th day of August, A. D. 1882.

(Signed) T. V. COUPLAND,
Deputy Clerk.

The whole respectfully submitted,

C. F. BUCK, City Attorney,

APPENDIX.

I respectfully submit to your Honors the following statement and affidavit, relative to the "*Statement of Facts.*"

Copy—Original Filed in the Clerk's Office.

The undersigned duly sworn, deposes and says, that when the motion to quash execution and levy under it, in the case of Judah Hart vs. The City of New Orleans, was called for trial, and the stipulation to "waive jury" was signed, he, affiant, then and there announced that he desired a statement of the facts to be made up, whether by the court or on agreement with counsel on the other side, to serve as a basis for assignment of error: that then and there, it was observed by court and counsel that as the main *facts* necessary to a decision of the questions presented would, probably, *as such*, not be disputed, counsel could easily come to an agreement; there was nothing said to the contrary by any one at the time, and affiant accepted this as an understanding that the facts of the case should be found by agreement or the court, for the purpose of making up the Record for this court.

The case was submitted to the court after oral and printed argument, and after the rendition and before the signing of the judgment affiant applied to the Circuit Judge for a statement of the facts Subsequent efforts, on affiant's part, to obtain the statement of facts are explained by the appended letter of the Hon. Don A. Pardee, Circuit Judge, which is embodied in full with certificate of Clerk, as a correct copy. When Mr. Farrar returned to this city, after his absence referred to by the Circuit Judge, at Baton Rouge, the undersigned submitted an outline to him, with the view of agreement on the facts, which was met by the following response from Mr. Farrar:

"NEW ORLEANS, July 12, 1882.

"Chs. F. Buck, Esq.:

"*Dear Sir:* I must refuse to sign the so-called statement of

" facts sent me by you in the case of Judah Hart vs. The City of " New Orleans, for the following reasons :

" 1st. There was no written stipulation filed in the case, " submitting the whole matter to the court. The court could have " found either a general or a special verdict. It found and signed " a general verdict.

" 2d. There was no agreement expressed or implied that the " counsel should draw up and sign any statement of facts.

" 3d. A writ of error having been taken and perfected, it is " no longer in the power of either the counsel or the court to " add to or take from the record.

" 4th. The proposed statement is not a proper finding of the " facts.

" 5th. It is erroneous and incomplete in many particulars." etc. * * * * * *

The original of this was at once sent by me to the Circuit Judge, who was absent from the city, with a statement containing my recollections on the entire subject. I believe that by the same mail opposing counsel sent objections to the allowance of any "Statement of Facts." The result was the "Statement" in the record, with the order thereon, and the reasons for the action of the court as expressed in the subjoined letter "A."

(Signed) C. F. BUCK.

Sworn to and subscribed before me, this 4th day of December, 1882.

(Signed) F. A. WOOLFLEY,
Clerk U. S. Circuit Court.

LETTER OF THE CIRCUIT JUDGE.

UNITED STATES CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT,
AT CHAMBERS,
WADSWORTH, Ohio, July 19, 1882.

Dear Sir—Enclosed find statement of facts in Hart vs. City, with order as to filing at the end.

My recollection is, that before the judgment was signed, Mr. Buck notified me that he desired a statement of facts. I told him that counsel could agree very easily, as it seemed to me. Shortly before I left Mr. Buck spoke to me again when Mr. Farrar was in Baton Rouge. I then told him counsel might agree, and that, under the circumstances, I would save him from all danger, except that caused by his own laches. I have, therefore, made a finding which he must take his chances on. I think it fair to both sides, allowing all points to be raised.

Show counsel on both sides this letter.

Very truly, etc.,

(Signed) DON A. PARDEE.

To F. A. WOOLFLEY, Esq.,
Clerk U. S. C. C., New Orleans.

U. S. CIRCUIT COURT.
EASTERN DISTRICT OF LOUISIANA,
CLERK'S OFFICE.

I certify that the letter copied on the reverse hereof is a true copy of the original letter of his Honor Don A. Pardee, transmitting the statement of facts in re Judah Hart vs. City of New Orleans, No. 9662 on the docket of this court, referred to in said letter.

[L. S.] Witness my hand and the seal of said court, at New Orleans, in said District, this 9th day of August A. D. 1882.

(Signed) T. V. COUPLAND,
Deputy Clerk.

The whole respectfully submitted,

C. F. BUCK, City Attorney,

114-654

SUPREME COURT U. S.
FILED
DEC 8 1982
JAMES H. McKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

REPLY OF DEFENDANT IN ERROR TO PLAINTIFF'S BRIEF ON MOTION TO DISMISS AND AFFIRM.

E. HOWARD McCALEB,
Attorney for Defendant in Error

A. W. Hyatt, Print, 73 Camp St. N. O.—23836

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 944.

CITY OF NEW ORLEANS, PLAINTIFF IN ERROR,

versus

JUDAH HART, DEFENDANT IN ERROR.

REPLY OF DEFENDANT IN ERROR TO PLAINTIFF'S BRIEF ON MOTION TO DISMISS AND AFFIRM.

I.

As regards the motion to dismiss, there is nothing in the plaintiff's brief that deserves notice.

As regards the motion to affirm, a few words must be said:

According to Mr. Buck's own statement and appendix, supplemented by the affidavit of Mr. Farrar (annexed to this brief, in appendix), a more outrageous case of negligence and laches as to the alleged statement of facts, was never shown to the court. It almost amounts to effrontery for the plaintiff in error, under that statement, to come forward and ask this court to annul the judgment and send the case back for a *venire de novo*.

What are the facts shown?

The parties waive a jury and submit the cause to the court. The court, in its discretion, finds a general verdict. Before the judgment is signed, counsel for the city applies to the judge for a special finding. The judge refers him to counsel on the other side. He does not go near that counsel or say anything to him about such statement, until a month and ten days after the judgment is signed, until twenty-two days after the court had

adjourned for the term, until thirteen days after he had voluntarily lodged his writ of error, filed his bond, and obtained the signature, issuance and service of the writ of error.

After he had thus, voluntarily, put it beyond the power of the court to make any finding, he applies during vacation, to the judge, who is *then* in a distant State, *out of his circuit*, to do that which he ought to have done, and which he might have done in the interval, between the 27th of May, and the 2d of June. No excuse whatever is presented for delaying action from May 27th, the day the judgment was rendered, until July 12th. Mr. Farrar was absent from the city only from June 27th to July 5th. He was here for six days after the court adjourned.

No possible excuse has or can be given for taking and perfecting the writ of error, before any steps were taken to get a statement of facts.

Under these circumstances, the case of Flanders vs. Tweed, 9 W. 424, has no application. As was remarked by counsel in Kearney vs. Case, 12 W. 278, where Flanders vs. Tweed was, as here, vainly pressed upon the court, it "was a special case, and almost in terms declared not to be a precedent."

II.

Knowing that this court cannot and will not notice the pretended made-in-Ohio-after-the-term-and-after-the-citation-in-error statement of facts, plaintiff pretends that there is other error assigned and assignable on the record. Here are its claims:

1st. *Did the Circuit Court acquire jurisdiction by the proceedings for removal from the State Court?*

After asking this question, plaintiff goes on to discuss the formality of an affidavit for removal, *which is not in this record, but which is in record No. 942, copied into this transcript.*

The counsel seems to forget that we have in this transcript three separate and distinct cases, which have no connection with each other. Each stands upon its own merit and its own assignment of errors.

Record No. 942, which contains the proceedings covered by the writ taken to reverse the original judgment, was closed by the perfection of the writ long before any of the proceedings in Record No. 944 were had.

It is simply preposterous to say that this or any other appellate court will annul a *fi. fa.* and quash a levy because of an irregularity in an affidavit for removal, *especially when no such matter was in issue in the lower court.*

Belk vs. Meagher, 14 Otto, 279.

When case No. 942 comes up for argument we shall then discuss whether there is any informality in the affidavit for a removal, and whether such informality, if any, has been cured by a default regularly entered.

We cannot be required to discuss these matters here in case No. 944.

2d. *The judgment, on its face, is a qualified and conditional one and not enforceable by the writ of fi. fa.*

This point is submitted by plaintiff without argument.

The judgment and its terms are not before the court in this record.

This is peculiarly true if, as plaintiff contends, the proceedings on this motion to quash are *independent proceedings*, to reverse which a writ of error will lie. The judgment was regularly offered in evidence, and the terms thereof form one of the pretended findings of fact.

If the judgment were before the court, the so-called assignment is frivolous on its face.

The alleged limitation upon the judgment refers only to the levy of taxes by mandamus to pay it. That limitation is nothing more than an explicit writing into the judgment of what the law would have written there, if the judgment had been absolute. There being certain legislative limitations upon the taxing power of the city in existence at the time the contracts sued on were made, those limitations were, of course, binding upon

Judah Hart when he came to execute his judgment by mandamus, to compel the levy and collection of taxes to pay it. And those limitations would necessarily have followed the judgment even if it had been absolute. United States vs. County of Macon, 99 U. S., p. 582. The limitation was put in the judgment by the consent of Judah Hart to satisfy the factious City Attorney, who thought an absolute judgment carried with it the right to *demand* the levy and collection of unlimited taxes to pay it.

3d. *It is suggested that the pleadings raise the question as a matter of law, whether Act. No. 5 of the Extra Session of the Louisiana Legislature, prohibiting the issuance of fi. fa.'s against the City of New Orleans is not binding on the Federal courts.*

This is another of the plaintiff's suggestions of error that it does not consider it safe to argue.

So little store is laid by the matter that counsel does not deem it incumbent on him to comply with rule 21 of this court, and print the statute relied upon in his brief, although this rule was pointedly called to the attention of the profession, in School District vs. Insurance Co., 101 U. S. 472.

Considering this statute *a private statute*, and not a public and general law, he specially offered it in evidence. Looking upon it in the same light, the Court found it as a fact, and annexed it to the statement. Thereupon counsel specially agreed that this statute should not be copied in the transcript, but should be annexed to brief. (Record, p. 68).

From this point of view, this statute must go the way of the statement of facts. It is part and parcel of that statement. *It is not before the Court either as a matter of fact, or as a matter of reference.*

But, conceding that the terms of the statute are what the counsel states, it is difficult to see how the prohibition of a State Legislature, as to process in execution *against a particular individual*, shall govern the courts of the United States in the execution of their judgments, unless it could be shown that Congress had adopted that prohibition, or had authorized the Court to adopt it, and that the Court had so done.

That a State legislative act had any such force *ex proprio vigors* no tyro would allege at this time.

Wayman vs. Southard, 10 Wh. 1;
Bank of U. S. vs. Halstead, Ib. 61.
Boyle vs. Zacharie, 6 Pet. 648;
Ross vs. Duval, 13 Pet. 59;
U. S. vs. Knight, 14 Pet. 314;
Amis vs. Smith, 16 Pet. 313;
Beers vs. Haughton, 9 Pet. 359;
McCracken vs. Hayward, 2 H. 615.

Can the plaintiff point now to any act of Congress or to any rule of court which which has adopted and made binding on the Federal courts, this prohibiting act in favour of *one single individual*, the City of New Orleans?

This question has been agitated again and again in the Fifth Circuit, and has been decided by Judges Woods, Pardee and Billings, as often as raised.

In the case of City of New Orleans vs. Thos. Pickles, not reported, decided by Judge Woods, at Atlanta, in 1879, the matter was extensively argued and discussed.

Judge Pardee has decided the question in several unreported cases-

Judge Billings has put his ruling in the matter on record in City vs. Morris, 3 Woods, 115.

This sufigestion is clearly frivolous. The complacence with which the plaintiff in error suggests that this court will hold the defendant here for three or four years, because he has a small security for his debt in the property seized, is amusing to behold. Frivolous attempts to keep judgment debtors, on admittedly valid and just claims, out of their money, will receive no favor in this court.

Respectfully,

E. HOWARD McCALEB,
Attorney for Defendant in Error.

APPENDIX.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS.

Personally came and appeared before me, the undersigned authority, *Edgar Howard Farrar*, Esq., who being duly sworn, deposes and says, that he was the counsel of record of Judah Hart in the United States Circuit Court for the District of Louisiana, in the case now pending on writ of error in the Supreme Court of the United States, and numbered 944 on the docket of the October term, 1882, and styled Judah Hart vs. City of New Orleans: that he alone conducted the trial of said cause on the motion made by the City of New Orleans to quash the fi. fa. and the levy thereunder; that the true facts attendant upon said trial were these:

When the case was called, affiant stated that it was a matter for a jury, whereupon Mr. Buck, the City Attorney, suggested the waiver of a jury; and the stipulation found on page 50 of the printed record was thereupon written up and signed. *Other than this stipulation there was no agreement, express or implied, between counsel or between the court and counsel.* Before the argument began, Mr. Buck stated to the judges that he would like to have the facts found specially. The answer of the court to this statement was, that the facts seemed to be admitted on both sides, and that counsel might draw a statement if they wished. In this colloquy between the court and Mr. Buck affiant took no part, and neither did nor said anything which would lead Mr. Buck to believe that affiant had consented that, in case the court should, in its discretion, find the facts generally, he would consent to draw a special finding or statement.

The record shows that, on May 27th, the general finding was made, and judgment was entered thereon, which judgment was duly signed on June 2d, 1882.

The annexed certificate of the clerk shows that the term ended, and the court adjourned on June 20th, 1882.

Affiant left the city of New Orleans on the 26th day of June, and went to Baton Rouge. He returned to New Orleans on July 5th.

In the meantime, as the record shows, on June 29th, the City of New Orleans filed her writ of error, and obtained the approval of her bond and the issuance of the citation in error.

On July 1st, 1882, Judge Pardee, the Circuit Judge, went to Wadsworth, Ohio.

On July 12th, Mr. Buck sent to affiant a so-called statement of facts, and requested him to sign it, which affiant refused to do for the reasons given in Mr. Buck's affidavit.

He then applied to the judge in Ohio who, against the written protest of affiant, then and there made the statement found in the record, and endorsed on it an order which saved the right of affiant to raise the question of his power to make it at that time and under the circumstances of the case.

Affiant declares that, from the day the case was tried, down to July 12th, as aforesaid, not a word was ever said to him by Mr. Buck about any statement of facts. What passed between him and the judge, affiant knows not, except from the written statement of the judge, which shows that Mr. Buck spoke to him but twice on the subject, once before the judgment was signed, and once while affiant was in Baton Rouge, i. e., between June 26th and July 5th, necessarily, therefore, *after the court had adjourned for the term.*

[L. S.] Sworn to and subscribed before me, this 6th day of December, 1882.

(Signed) CHAS. T. SONIAT,
Notary Public,

(Signed) E. H. FARRAR,

UNITED STATES OF AMERICA,

CIRCUIT COURT OF THE UNITED STATES,

FIFTH CIRCUIT AND EASTERN DISTRICT OF LOUISIANA.

APRIL TERM, A. D. 1882.

NEW ORLEANS, Tuesday, June 20, 1882.

Court met pursuant to adjournment. Present—the Honorable Don A. Pardee, Circuit Judge.

Ordered that this Court stand adjourned *sine die*.

CLERK'S OFFICE:

I certify the foregoing to be a true copy from the original record in this office.

[L. S].

Witness my hand and seal of said Court, at the City of New Orleans, this sixth day of December, 1882.

(Signed), F. A. WOOLFLEY,

Clerk.

114-654

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 283.

THE CANAL AND CLAIBORNE STREET RAILROAD COMPANY, GARNISHEE, *Plaintiff in Error,*

versus

JUDAH HART.

Error to the Fifth Circuit and Eastern District of Louisiana.

Brief for Defendant in Error.

E. HOWARD McCALEB,
E. H. FARRAR,
Attorneys.

A. W. Hyatt, Print, 73 Camp St N. O—51,669

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 283.

THE CANAL AND CLAIBORNE STREET RAILROAD COMPANY, GARNISHEE, *Plaintiff in Error,*

versus

JUDAH HART.

Error to the Fifth Circuit and Eastern District of Louisiana.

Brief for Defendant in Error.

PRELIMINARY STATEMENT.

The attention of the Court is called to the fact that, when this case was filed at the October Term of 1882, the defendant in error made a motion to dismiss and affirm, which your Honors took under advisement, and which, by an order subsequently entered in the case, you directed to be heard at the time the case was argued upon the merits. We have nothing to add to the argument presented in the brief on the motion to dismiss herein filed. We shall, however, restate the case for the convenience of the Court.

STATEMENT OF CASE.

On March 3d, 1882, Judah Hart obtained a judgment at law, in the court below, against the City of New Orleans, for the sum of $121,697 18, with interest and costs—(p. 34).

On March 15th, 1882, having issued a fi. fa. against the judgment debtor, he filed a supplemental petition in accordance with

the provisions of Articles 246 and 642 of the Code of Practice of Louisiana, averring the issuance of such fi. fa.; that he had reason to believe that the Canal and Claiborne Street Railroad Company, a corporation organized under the law of Louisiana, was indebted to the defendant in execution, and that he had caused a seizure to be made in the hands of said company.

The prayer was: that the said company be cited and ordered to answer, under oath, the annexed interrogatories, and that the said company be condemned to pay the amount of the judgment and costs—(p. 37).

On this petition the Court made an order directing the company to answer these interrogatories, as prayed for—(p. 38).

Citation in garnishment, in due form of law, was issued and served on the company—(pp. 38 and 39).

On March 25th, the company, *without making any objection, or interposing any exception, plea or demurrer*, filed its answer, as follows—(pp. 41 and 42):

"The Canal and Claiborne Street Railroad Company, made garnishee herein, now comes into court, and for answer to the interrogatories propounded, by and through its President, E. J. Hart, says:

To the first interrogatory, no: except for taxes for the year 1882.

To the second interrogatory, no: except for taxes for the year 1882.

To the third interrogatory, no; and for a full and correct statement of the facts upon which the above answers are made, respondent, further answering, says, that the privilege of the right of way of the Canal and Claiborne Street Railroad Company was granted for and in consideration of a bonus of two-sixteenths of a cent per passenger, payable monthly. The rate of fare is five cents per passenger.

That the total receipts of the company from the 1st of March, 1870, to the 15th March, 1882, are" (here follows detailed statement of receipts).

"Your respondent further says, that the receipts from the 15th March, 1872, to 15th March, 1882, amount to the sum of $1,046.918.

Your respondent further answering, says, *that he is informed and believes* that the bonus was in lieu and place of the license; that the city could not claim both; that it has ceased to demand the bonus, but has imposed a license on the company, and the company has paid the same in 1880, based on the receipts of 1879; in 1881, based on the receipts of 1880, and in 1882, based on the receipts of 1881, viz: $375 each year, making in all $1125, thereby releasing the company from any obligation to pay any bonus for said years.

And respondent further says, that he is informed and believes that any claim for bonus, based on the receipts of preceding years, is prescribed.

Respondent further *swears*, that the said Canal and Claiborne Street Railrad Company has already been garnisheed in the suits of Myra Clark Gaines, Sam'l. Smith, Subrogee, vs. City of New Orleans, No. 2695 of the United States Circuit Court, and of Charles Parsons vs. City of New Orleans, No. 8088 of the same Court, and that should judgments be rendered against said company, they will amount to more than the company can, in any event, owe.

Respondent further says, that the company has claims against the City of New Orleans for damages caused by overflows in 1869, 1871, and 1881, and against which it should have been protected by the City; and that the amount due for said damages exceeds any amount which would be due for the bonus, if any was due.

For this, and other reasons, the City has not required the bonus."

On March 30th, the plaintiff in execution, according to the practice in Louisiana, made a motion suggesting that the company's answers were *false and untrue*, and that it was indebted to the City of New Orleans *in a much larger sum than stated in its*

answer, and suggesting further, that the plaintiff *traversed said answers both in law and in fact;* obtained an order to said company to show cause on the 5th day of April, 1883, why the interrogatories should not be taken for confessed, and why judgment should not be rendered against it for the amount of the plaintiff's claim and costs (pp. 42 and 43).

On the day named in the rule, the company appeared and plead the statute of limitations (or prescription, as we call it) of three and ten years (R. p. 43).

On the same day, the counsel for plaintiff and defendant in execution, filed a stipulation in writing, to the effect that any and all sums paid by the garnishees should be deposited in the registry of the Court to await the decision of the question between the plaintiff and defendant, whether such money was subject to seizure under the plaintiff's executions (p. 43).

On the same day, without any objection or exception of any kind all the parties went to trial on these issues (p. 44). The minutes of the Court say (Ib.):

"The traverse to the answer of the Canal and Claiborne Street Railroad Company, garnishee, came on for trial—E. H. Farrar, for plaintiff, H. D. Ogden, for garnishee—when the following named jurors were called and sworn to well and truly try the issue herein, etc.

And after hearing the pleadings, the evidence, the agreement of counsel, and receiving a charge from the Court, the jury retired to deliberate on their verdict," etc.

The jury found for Judah Hart against the company for the sum of $33,684 44, with interest from various dates (p. 44).

Upon this verdict the following judgment was entered in the minutes of the same date (p. 58).

"By reason of the verdict of the jury herein, and in accordance therewith, it is ordered, adjudged and decreed that the Canal and Claiborne Street Railroad Company, garnishees herein, be condemned to pay the plaintiff, Judah Hart," etc., (naming the sum and interest found in the verdict).

"It is further ordered, adjudged and decreed that said amount with interest, as aforesaid, be deposited in the registry of the Court, subject to the terms of the stipulation this day entered into by counsel for said plaintiff and C. F. Buck, City Attorney, for the City of New Orleans, on file herein."

No exceptions were reserved and no bills taken, either to the charge of the Court or to any ruling made during the progress of the trial.

The company having, as appears by its rambling and shuffling answer, no defense whatever to the payment of its just debt to the city, and there being absolutely nothing in the record upon which error could be assigned here, and desiring and striving to raise or create some excuse to bring the matter here, in order that they might have delay, and in order that they might take the chances of a reversal by the city of this judgment, which had been obtained, from which the City of New Orleans had taken a writ of error to this Court, employed new counsel and presented a motion for a new trial (R. p. 45).

The new trial was denied (p. 54).

The motion for a new trial being refused, the garnishee, thereupon, filed a proceeding which he called a motion in arrest of judgment, setting forth ten utterly frivolous grounds, and asking "that the proposed judgment written up in this cause upon the minutes, and record of the Court against the said corporation, as garnishee, be expunged from the record and the minutes, and that the same be never signed and made operative, and that any and all judgments against said Canal and Claiborne Railroad Company, by reason of any supposed proceedings against the said corporation as garnishee, or by reason of any verdict herein, be arrested" (pp. 52-3-4).

A day was fixed for the hearing of this alleged motion, and after hearing, the motion was overruled.

To the overruling of this motion, the garnishee took a bill of exceptions (p. 59). *and this is the only error which is assigned upon the record* (pp. 71-2-3), *in accordance with the provisions of*

Sec. 997, U. S. Revised Statutes, and Rule of this Honorable Court.

The record in this case consists of the supplemental petition in garnishment, the interrogatories annexed, the order of the Court directing the garnishee to answer, the citation in garnishment, the answer of the garnishee, the rule traversing those answers, both in law and in fact, the garnishee's plea of the Statute of limitations, the stipulations between plaintiff in defendant in execution, extract from the minutes showing the empanneling of the Jury and the trial of the cause, the verdict of the Jury, the judgment thereon entered, the motion for a new trial, the order refusing it, the motion in arrest of judgment, the order refusing it, and the bill of exceptions taken upon the refusal of the motion in arrest of judgment.

If, therefore, no error can be assigned on a motion in arrest of judgment, then there is nothing in the case on which error can be assigned.

A motion in arrest of judgment, in a civil cause, is a proceeding unknown to the law of Louisiana. The proceedings in the court below being on the law side, are to be governed by the law of Louisiana.

Art. 556, of the Louisiana Code of Practice, says:

"Definitive judgments may be revised, set aside or reversed

1st. By a new trial;

2d. By an appeal;

3d. By an action of nullity;

4th. By rescision;

This last mode can only be exercised by minors, or persons who were absent when judgment was rendered against them."

If a motion in arrest of judgment is known to the law of Louisiana, it falls into one of these four categories.

Plainly it does not come within either the second or the fourth.

Nor does it come within the third. Art. 610, of the same code, provides that an action of nullity must be brought in the

court which rendered the judgment, by petition and citation, and that the adverse party must be cited to appear as in ordinary suits.

We have, then, but one category left to discuss—new trial.

If, now, such a motion is equivalent to a motion for a new trial, no error can be assigned here on the refusal below.

Such has been the uniform jurisprudence of this Court since its organization.

Henderson vs. Moore, 5th Cranch, 11;

Warner vs. Norton, 20th H. 448;

Indianapolis R. R. Co. vs. Horst, 93 U. S. 291;

Newcomb vs. Wood, 97 Id. 581;

Railway Co. vs. Heck, 102 Id. 120;

Jones vs. Buckell, 104 Id. 555.

The bill of exceptions taken to the refusal of the motion is a nullity. Such a bill can be taken only to some ruling during the progress of the trial, or to the charge of the judge to the jury.

After verdict, and judgment entered thereon, the trial is ended and the record is closed. There is no room for a bill of exceptions on anything that can take place in due course of procedure between the entry of the judgment and its signature.

Even under the common law system of pleading a motion in arrest of judgment is nothing but a proceeding whereby the attention of the inferior court is called to some fundamental error patent on the face of the record—such an error as could be assigned in the superior as well as in the inferior court. From this point of view it would be just as irregular to take a bill to the overruling of a demurrer, as a bill to the overruling of motion in arrest of judgment.

But let us pass to the grounds stated by the garnishee as reasons why the judgment should be arrested. We think that they will be found so frivolous as to justify the demand of the defendant for the imposition of the penalty of ten per cent. provided for in the 2d section of the 23d rule of this Court.

Here are the grounds in full (p. 534):

1st. That there is nothing in the said supposed proceeding of garnishment to warrant or support any verdict or any judgment of any kind against the said corporation, the Canal and Claiborne Street Railroad Company, in favor of the said Judah Hart, the plaintiff in execution, or any other person.

2d. That there is no issue made in the said cause, nor had there been any issue or default made on the said supplemental petition herein prior to the said verdict, nor at any time.

3d. That there has been no issue or service of any citation against or upon said supposed supplemental petition in this cause, either directed to or served upon the said mover, the Canal and Claiborne Street Railroad Company.

4th. That there has been no service upon the mover of the original and supplemental petition in this cause, with due citation, as appears by the record herein.

5th. That there has been no service of the supplemental petition upon the defendant in execution; the City of New Orleans has not been made a party to, or brought into Court in said proceeding against the said Canal and Claiborne Street Railroad Company, the mover, in such a manner as to conclude the said City of New Orleans, in any alleged demand against the said mover, or in any such manner as to warrant or sustain any verdict or judgment against the said mover as garnishee.

6th. That it appears from the record herein, that at the time when said matters were submitted to the jury, there was no issue of facts to go to the said jury; that there was no answer to the supplemental petition in any default therein.

7th. That had there been any issue of fact submitted to the jury, the said question was not whether Judah Hart, the plaintiff, should have a verdict against the Canal and Claiborne Street Railroad Company, garnishee, but whether the said supposed answer to interrogatories on facts and articles should be taken as confessed and used upon the trial of the issues made or to be made, on the supplemental petition; said issues had not been

made either by answer to said supplemental petition or judgment by default thereon.

8th. That it appears from the record in said cause that under no circumstances could the Canal and Claiborne Street Railroad Company become, or be liable to pay any supposed balance due the city of New Orleans to said plaintiff, Judah Hart, for the reason that it appears from the record herein, that said supposed debt of the Canal and Claiborne Street Railroad Company to the city of New Orleans, the defendant in execution, if due and owing was, and is a part of the municipal revenues of the city beyond the reach of execution or garnishment process; and that had the said Canal and Claiborne Street Railroad Company, garnishees, produced the money or property claimed in kind, or in species and placed and held the same within reach of the plaintiff in execution he could not lawfully levy any fi. fa. upon the same.

9th. That under the statutes of the State no interrogatories on facts and articles can be directed to a non-sentient being or corporation in garnishee proceedings, as the said interrogatories on facts and articles are only the means of probing the conscience to procure evidence.

10th. That there is nothing in the said record to warrant or support any judgment against the Canal and Claiborne Street Railroad Company as garnishee, in favor of the said Judah Hart, the plaintiff in judgment, or any other person.

However, it will be well to demonstrate here the entire regularity of the proceedings.

Art. 642, of the Code of Practice of Louisiana, provides: "This writ, (the writ of fi. fa.) is directed to the Sheriff of the Parish where the property of the debtor is situated, and orders him to seize the property, real and personal, rights and credits of the debtor, and to sell them to satisfy the judgment obtained against him," etc. "And whenever a party, plaintiff in a cause, has applied for a writ of *fieri facias* against the defendant, and has reason to believe that a third person has property, or effects in

his possession, or under his control, belonging to the defendant, or is indebted to him, he may cause such third person to be cited to answer under oath such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner, and with the same regulations as are provided in relation to garnishees in cases of attachment and pursuant to special laws," etc.

Article 246, of the same Code, under the head of *Attachment in the hands of third persons*, provides:

"If a creditor know or suspect that a third person has in his possession property belonging to his debtor, he may make such a person a party to the suit, by having him cited to declare on oath, what property belonging to the defendant he has in his possession, or in what sum he is indebted to such defendant even when the term of payment has not yet arrived. The person thus made a party to the suit is termed the garnishee. And whenever a party plaintiff in a cause has applied for a writ of *fieri facias* against the defendant, and has reason to believe that a third person has property or effects in his possession, or under his control, belonging to the defendant or is indebted to him, he may cause such third person to be cited to answer, under oath, such interrogatories as may be propounded to him touching said property and effects, or such indebtedness, in the same manner and with the same regulations as are provided in relation to garnishees in cases of attachment; such third person shall thereupon be bound to answer in the same manner, and shall be liable in the same manner for his neglect or refusal to answer; and his answers may be disproved in the same manner as those of garnishees. In case such third person *shall confess* in his answers, that he has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him in any sum of money, the Court shall order him forthwith to deliver up said property, to pay such sum (if the same be due, and if not, when the same shall be due,) to the sheriff," etc.

Articles 250, 251 and 252, of the same code, provide:

Article 250. "A garnishee may be made party to a suit, and be cited to answer interrogatories on facts and articles, either by praying to that effect in the original petition or by a supplemental petition, filed at any stage of the suit previous to rendering the judgment."

Article 251. "When an order to attach property in the hands of a third person has been given by a court, the clerk of such court shall deliver or send to the sheriff a copy of such order, as well as of the petition, together with a citation to the person made party to the suit, to answer such petition within the usual delay granted in ordinary cases."

Article 252. "If there be a garnishee made party to the suit, the clerk must deliver or send to the sheriff a copy of the petition and of the interrogatories annexed to it, if there be such, with a summons directed to such garnishee to answer the same within the delay given in ordinary suits."

Articles 262, 263 and 264 are as follows: "Art. 262. The garnishee who has been cited in a suit, must put in his answer within the usual delay, declaring in the same fairly and truly what property belonging to defendant he has in his possession, by whatever title he may possess the same, as well as what sums he may owe to such defendant, whether the same be due or not yet due; and if interrogated on facts and articles he must answer under oath clearly and categorically each question put to him touching the matter."

"Article 263. If the garnishee, to whom interrogatories have been put refuse or neglect to answer the same under oath, in the delay of the law, such refusal shall be considered as a confession of his having in his hands property belonging to the debtor sufficient to satisfy the demand made against such debtor, and judgment shall be rendered against him for the amount claimed by the defendant, with interest and costs."

"Article 264. Although the answer of the garnishee to the questions put to him, be made under oath, the plaintiff may, nevertheless, show the same to be false either by positive writ

ten proof or by the oath of two witnesses worthy of belief, in the same manner as when interrogatories on facts and articles have been put to a party in a suit, and if it be proved by such evidence that the garnishee has in his hands property or effects belonging to the party against whose property the attachment has been granted, or that he be indebted to him in any amount, such property and effects as well as such sum as may be due by him shall be subject to satisfy such judgment as may be rendered against the defendant."

These articles stand now as they stood in the Code of 1825, prior to the passage of the act of March 30th, 1839, which allowed garnishment proceedings after judgment on the issue and of a fi. fa., the provisions of which act are embodied in articles 642 and 246, quoted above. These articles apply solely to cases of *attachment*, i. e. where a seizure is made in the hands of a third person *before judgment*. It is easy to see that there is an essential difference between garnishment before and after judgment. See Marquez vs. LeBlanc, 29 A. p. 203, where this difference is discussed.

The Code nowhere provides how the answers of a garnishee shall be traversed or disproved.

It was held in a very early case, Rocknell vs. Smith, 1 La. 229, that, although no such provision was made, he was entitled to notice in some form.

From the time of the passage of the Act of 1839, above referred to, the mode of traverse has been a rule to show cause why a judgment should not go against him for the amount of the plaintiff's judgment.

Okey vs. Miss. and Ala. R. R. Co., 13 La. 539;
Florance vs. York, 2 A. 995;
Dickson vs. Morgan, 6 A. 562;
Dickson vs. Morgan, 7 A. 490;
McDowell vs. Cook, 10 A. 31;
Ferguson vs. Murphy, Ib. 53;

Gatey vs. Franklin Ins. Co., 12 A. 272;
Cater vs. Morrell, 14 A. 376;
Barnes vs. Wayland, Ib. 791;
Marks vs. Reinberg, 16 A. 348;
Bell vs. Short, 25 A. 312;
Denouvion vs. McNight, 25 A. 74;
Foulhouze vs. Gaines, Ib. 84;
Dupervis vs. Halliday, 29 A. 133;
Hermen vs. Forget, Ib. 381;
Flash vs. Norris, Ib. 93;
Maduel, Ex. vs. Mousseau, 28 A. 671;
Ivens vs. Johnson, 30 A. 249;
Garcia y Leon vs. La. Mut. Ins. Co., 31 A. 546.

So firmly had this practice been settled, that it was recognized and legalized by the first Section of Act No. 27, of the extra session of 1877, which provides as follows:

"That hereafter, in all cases where plaintiff desires to disprove or traverse the answers to interrogatories propounded to a garnishee under a writ of attachment, or of *fieri facias*, he shall, within twenty judicial days after said garnishee shall have filed his said answer, *file a rule in Court*, or institute other proceedings against said garnishee for the purpose aforesaid, and upon the failure of said plaintiff *to file a rule*, or institute other proceedings as aforesaid, any property, rights or credits in the hands of said garnishee, shall by the mere fact of said failure be considered as released from seizure under said writ of attachment or *fieri facias*, etc.

In response to this rule to show cause, the garnishee was at liberty to go to trial without answer.

Okey vs. Mississippi and Alabama Railroad Company, *supra*;
Flash vs. Norris, *supra*;

He could answer and demand a jury trial.

Denouvion vs. McKnight, *supra*;
Foulhouze vs. Gaines, *supra*.

As seen by the other cases, he could set up his defenses by way of plea. But it was settled at an early period, that all objections to the mode of procedure, or to the vagueness of the traverse must be specially pleaded in *limine litis*.

Florance vs. York, *supra*.

If he failed to answer the interrogatories in garnishment, they were taken *pro confessis*, and judgment was rendered against him immediately, without the formality of default or of any rule to show cause.

Parmely vs Bradbury, 13 L. 351;
Sturges vs. Kendall, 2 A. 565;
Poole vs. Brooks, 12 R. 484;
Landry vs. Dickson, 7 A. 241;
Elder vs. Rogers, 11 A. 606.

If he answered and confessed he was ordered, as provided in article 246 *supra*, to pay to the sheriff. If he answered evasively or denied, a rule was taken upon him to show cause why he should not pay the plaintiff's judgment, and if his answers were disproved on the trial of that rule, judgment went against him in favor of the plaintiff immediately.

No provision of law, expressed or implied, ever required that the defendant in execution should be made a party by citation to the proceedings against a garnishee *after judgment*. He was already a party as defendant in execution, and was of course served by the sheriff with the notice of the seizure made in the hands of the garnishee.

There is no case on record where any such thing was ever done or required to be done.

Neither is there any case on record where any other issue was made on a trial with a garnishee, except that on the traverse to his answers.

Apply these unquestionable principles to the record, and what do we find:

1st. A petition setting forth the judgment against the defendant in execution, the amount thereof, the issuance of the

writ of *fi. fa.* thereunder, the belief of indebtedness by the garnishee, the seizure that had been made in his hands under the writ, and closing with a prayer that the garnishee be cited to answer, under oath, the annexed interrogatories, and that after due proceedings that a decree might go against the garnishee for the amount of the judgment, interest and costs.

2d. The interrogatories annexed to this petition.

3d. The order of the court directing that the company be made garnishee, and be ordered to answer as prayed for.

4th. The citation in garnishment, with due return of service.

5th. The answer of the garnishee within the time named.

6th. The traverse to the answers, both in "*law and in fact*," suggesting that those answers *are false and untrue*, and that the garnishee is indebted unto the defendant in execution in a much larger sum than that admitted, and ruling the garnishee to show cause, on a day fixed by the court, why judgment should not be rendered against him for the amount due plaintiff by the defendant in execution.

7th. The appearance of the garnishee on the day fixed and showing cause by pleading the statutes of limitations.

8th. The trial before a jury of the issues thus made in due form of law *without objection or exceptions of any kind.*

9th. The verdict of the jury in due form of law on the issues thus presented.

10th. The judgment properly and legally entered on said verdict.

If the proceedings in this case are irregular, informal and void to any extent, or to such an extent that *even a verdict cannot cure them*, then we can safely say that, there never has been a valid garnishment proceeding in the United States Circuit Court for the District of Louisiana.

These proceedings were had in the Court below on blank printed forms, which have been in use in that Court, without question, for more than forty years.

The second, third, fourth, fifth, sixth and seventh grounds stated above may be disposed of together.

In the first place, all such supposed irregularities even if they existed in law, or in fact, were cured by the voluntary appearance and answer of the garnishee.

All questions as to the irregularity of the process by which a party is brought into Court, are varied by appearing, pleading or answering.

Creighton vs. Kerr, 20 Wall. 12;
U. S. vs. Yates, 6 How. 605.
Dyson vs. Brandt, 9 Martin, 493.
DeBuys vs. Johnson, 4th N. S. 286.
Roulett vs. Shepard, 4th La. 91.
Livingston vs. Dick, 1st A 323.
City vs. Hall, 21st A. 438.
City vs. Walker, 23d A. 803.
Heard vs. Patton, 27th A. 542.
Nicholson vs. Jennings, Ib. 432.

All complaints as to non joinder of parties are dilatory matters which must be plead in *limine litis* and cannot be urged, if not so plead.

Code of Practice. Article 333.
Pascal vs. Ducros, 8 R. 112.
Stenart, ex., vs. Scudder, 10 A. 216.
Tanner vs. King, Ib 485.
Edwards vs. Smith, Ib. 536.
Brener vs. Cook, 11 A. 637.
Dunbar, ad., vs. Murphy, Ib. 713.

No error as to a matter in abatement can be urged in this court.

U. S. Rev. Stat. §1011.

In the second place they were cured by going to trial before the jury without objection. *Consensus tollit errorem.*

In the third place they were cured by the verdict.

"No summons, writ or declaration, return, process, judgment

or other proceedings in civil causes in any court of the United States shall be abated, arrested, quashed or reversed for any defect or want of form; but such Court shall proceed and give judgment according as the right of the cause and matter in law, shall appear to it, *without regarding any such defect or want of form* except those which, in cases of demurrer the party demurring specially sits down together with his demurrer as the cause thereof." etc. U. S. Rev. Stat. 954.

In the fourth place the statements as to absence of a formal issue are untrue in point of fact, and bad in point of law.

The answers of the garnishee were traversed as the law of Louisiana provides, and the *garnishee joined formal issue on the traverse by his plea of prescription.*

The eighth ground is disposed of in a few words. In the first place the record discloses no facts to show that the debt due by the garnishee to the defendant is a part of the Municipal revenues.

In the second place, even if it did, the garnishee is a mere stakeholder, and has no right or authority to contest such a question.

Kimball vs. Plant, 14 La. 514.
Featherston vs. Compton, 3 A. 380.
Brodie vs. Firemen's Ins. Co., 8 R. 244;
Cambell vs. Meyers, 16 A. 362;
Citizens Bank vs. Payne & Gilman, 21 A. 383.

In the third place the stipulation in the record shows that the garnishee was by agreement between the plaintiff and the defendant in execution, to pay this fund into Court, subject to the rights of all parties concerned, and this agreement was embodied in the judgment against the garnishee.

Since this case has been brought here, Judah Hart and the City of New Orleans have compromised their differences; and at this term the City of New Orleans, plaintiff in error from the judgment in favor of Hart, has consented to the dismissal of her writ, has acquiesced in the judgment, and has (as appears by

the notarial compromise, copy of which was filed in this court, consented that whatever the Canal and Claiborne Street Railroad Company may owe, it shall be applied to the satisfaction of this judgment in favor of Hart. This compromise, for the convenience of your Honors, is printed in full in the appendix to this brief.

After this compromise had been made, we did not think it possible that the Canal and Claiborne Street Railroad Company would any longer resist payment of the amount due by it. At all events, we did not consider it any longer possible for the counsel of that company to file again, as a brief on the merits of this cause, the bad-tempered, bad mannered, record-misquoting brief that was filed in opposition to the motions to dismiss and affirm. In this new brief he has attempted to depart from his assignment of errors brought up in accordance with the provisions of the Revised Statutes and with the rule of this court, and has attempted to assign other matters in which his client has no interest.

We shall particularly take up these assignments of our friend on pages 12 and 13 of his brief, and discuss them.

First. He first complains that the Circuit Court never acquired jurisdiction of the original suit of Judah Hart against the City of New Orleans.

The Court will remember that there were three cases bound up together in this one record, the original case of the City vs. Hart, which is numbered 282 on the docket; the case of the Canal and Claiborne St. R.R. Co., which is numbered 283, and the case of the City against Hart, arising upon the motion to quash the fi. fa. which is numbered 284. Nos. 282 and 284 have by consent of the City of New Orleans been dismissed, and the City of New Orleans has acquiesced in the judgment rendered against her in favor of Hart, and as we have shown above, has consented that the money due her by the Canal and Claiborne Street R. R. Co. shall be applied to the payment of Hart's debt. Ignoring the fact that no part of the record 242 is before this Court, ignoring

the fact that no part of it was before the court below, and ignoring the fact that the writ of error taken by the City in that case has been dismissed, this garnishee, who is a mere stakeholder, attempts to go into that record, and to discuss the question as to the regularity of the removal of that case from the State Court to the Federal Court on a question that was litigated between the City and Hart in the lower court, and in which the lower court rendered a judgment in favor of Hart.

This is the first time that we have ever heard respectable counsel attempt to argue that the time when an affidavit of local prejudice was made would render a judgment of the Circuit Court, to which the case was removed in due form of law, an absolute radical nullity, which anybody could attack in a collateral manner. According to the argument of counsel, the judgment in favor of Hart against the City of New Orleans is an absolute and radical nullity simply because it appears from the record that Hart made affidavit of local prejudice before the case was filed in court.

There is no question but that Hart was a citizen of New York, that the City of New Orleans was a citizen of Louisiana, that the controversy exceeded $500, that a petition for removal was made, a bond for removal was tendered, an affidavit for removal was filed. The State Court held that the petition, affidavit and bond were sufficient to remove the cause. The Circuit Court held that the petition, affidavit and bond were sufficient to remove the cause, and the Circuit Court thereupon proceeded to hear the cause and render a judgment.

This garnishee, however, this stake-holder, undertakes now to come into this Court, undertakes to go out of his own record into a record with which he has no concern, to argue the question whether or not the State Court and the Circuit Court were right in their ruling as to the relation between the date of the affidadit and the date of the filing of the case. The statement of this proposition is sufficient answer.

Second. He claims that there was no lawful fi. fa. in the

case, because at the date of the issuance of the fi. fa. there was no law under which a fi. fa. could issue against the City of New Orleans.

Your Honors will notice that no objection of this sort was made in the court below at any time, or at any point in the proceedings. It was not made in the so-called motion in arrest of judgment; it is not embodied in the so-called bill of exceptions; it is not assigned as error in the assignment attached to the writ; it is something which has occurred to the counsel in this Court.

We understand it to be the settled practice of your Honors not to consider any question, or any alleged assignment of error that was not before the court below.

We are at a loss to understand the counsel's argument in this last brief. It is a jumbling of two different arguments which he attempted to make in his brief in opposition to the motion to dismiss and affirm. In that brief he contended that that there was no statute in existence which authorized the Federal Court to issue process in execution by garnishment, or otherwise. This position is somewhat abandoned in the new brief and the argument confined to the position that Act No. 5, of the Louisiana Acts of 1870, being a special statute in favor of the City of New Orleans, exempting that city from writs of fi. fa. in the State Court, is binding on the Federal Court.

It is difficult to see how the prohibition of a State Legislature as to process in execution against a particular individual (because the City of New Orleans is nothing more than a particular individual) shall govern the Courts of the United States in the execution of their judgments, unless it can be shown that Congress had admitted that prohibition, or had authorized the Court to adopt it, and that the Court has done so.

That a State Legislative Act had no such force *ex proprio vigore* no tyro would urge at this time.

Wayman vs. Southard, 10 Wheaton, 1.

Bank of United States vs. Halstead, Ib. 61.

Boyle vs. Zacharie, 6 Pet., 648.

Ross vs. Duval, 13th Peters, 59.
United States vs. Knight, 14th Peters, 314.
Amis vs. Smith, 16 Peters, 313.
Beers vs. Haughton, 9th Peters, 359.
McCracken vs. Hayward, 2nd Howard, 615.

Where is the Act of Congress, or any rule of Court, which has adopted, or made binding on the Federal Court, this prohibiting act, in favor of one single individual, the City of New Orleans? The counsel pretends that this private act in favor of the City of New Orleans was adopted and made part of the Statutes of the United States by the Act of June 1st, 1882, now Section 916 of the Revised Statutes.

Leaving out of view entirely Sec. 716, which gives the Court authority to issue all writs necessary for its jurisdiction, and which was decided in the case of Wayman vs. Southard, and Bank vs. Halstead, *supra*, to authorize the issuance of a writ of *fi. fa.*, it would be a long step further to say that Congress in adopting, by means of Sec. 916 of the Revised Statutes, the modes of procedure fixed by the general Statutes of a State, intended also to adopt, and make binding in the Federal Courts, all the private and special acts in favor of particular individuals. The object of Sec. 916, of the Revised Statutes, was not to restrict the powers of the Federal Courts, but to enlarge them, and to enable those Courts to adopt on the law side, the summary, statutory proceedings provided in some of the States in lieu of a creditors' bill. It never was intended to impair the power of the Court to issue a writ of *fi. fa.* to enforce its judgment, and it never was intended, in making the general Statutes of the State the basis of the procedure of the Federal Court to adopt and make binding on those Courts all the private and special acts in favor of individuals.

The question as to whether Act 5 of 1870 is binding in the United States Circuit Court for the Eastern District of Louisiana has been agitated again and again in the Fifth Circuit, and has been decided by Judges Woods, Pardee and Billings so often

that it has become the settled practice of that Court, that the statute does not apply.

In the case of The City of New Orleans vs. Thomas Pickles, not reported, extensively argued before Mr. Justice Woods, when he was on the Circuit bench in Atlanta in 1879 (a case which he will doubtless remember) he decided that Act 5 had never been made binding upon the Federal Court by any statute of the United States, or by any rule of the Court; that it was a special private statute in the interest of the City of New Orleans, which was not binding on that Court, and which had never been adopted by Congress and made part of the federal procedure.

The same thing has been decided by Judge Billings in the case of the City of New Orleans vs. Morris, reported in 3rd Woods, p. 115. The same point has been decided a great many times by Judge Pardee in unreported cases, and by Judge Billings and Judge Pardee sitting together in the case of Hart against the City of New Orleans, 12 Fed. Reporter, p. 292.

It is the settled jurisprudence of both of your Honors, and the Supreme Court of Louisiana, that this act No 5 of 1870, in so far as it applies to contracts which were made prior to its date, impairs the obligation thereof, and is void.

Wolf vs. New Orleans, 103 U. S. 358.

State, ex rel. Morris Ranger vs. the City of New Orleans, unreported decision of the Supreme Court of Louisiana.

There is nothing before your Honors in this proceeding to show what the judgment in this case is based on, or, if upon contracts, when those contracts were made, whether before or after 1870.

Third. He complains that the indebtedness of the plaintiff in error to the City of New Orleans is a part and portion of the public revenues of the city, and not liable to seizure or levy under any form or process for the collection of debts.

This is another question which was not before the court below. It is a question which the garnishee, as a stakeholder,

cannot raise: the only person interested in any such issue is the City of New Orleans, and the record shows that she has consented, by her compromise, that what the Canal and Claiborne Street Railroad Company owes her shall be applied to the payment of the debt of Judah Hart.

There is no basis of law or of fact in this record upon which such a question can be discussed here. Even if we should admit to be true the statement that the indebtedness then due by the plaintiff in error to the City of New Orleans was a bonus to be paid by the city for a railroad franchise, and then the plaintiff would be no better off, because the Supreme Court has decided in two recent cases, State ex rel. New Orleans Gaslight Co. vs. Mayor, 31st A. 268, and Board of Liquidation against the City, 1b. 916, that such a bonus is property devoted, by the 10th section of the Act of March 26th, 1876, of the Louisiana Legislature, to the payment of the bonded and floating debt of the city.

Fourth. The assignment in the brief to the effect that the judgment debtor was not made a party to the proceedings in garnishment and is not concluded thereby, and that the plaintiff in error is not protected thereby against a demand from the city of New Orleans, for the same alleged debt has been discussed in its legal shape under the head of the assignments of error attached to the writ of error.

Your Honors will see how absurd this opposition now stands in the light thrown upon it by the fact that the city of New Orleans has consented that the indebtedness due her by this plaintiff in error shall be applied to the payment of Hart's judgment.

Fifth. It is claimed that the supplemental petition upon which the defendant was brought into court, if it had been exhibited against the proper parties, does not disclose or set forth a cause of action against the plaintiff in error, in that it does not show that the alleged indebtedness of the Canal and Claiborne Street Railroad Company to the city is not public property, and not a part of the public revenues of the municipal cor-

poration beyond the reach of a writ of execution, or the garnishment process.

It seems rather strange that a defendant who should voluntarily answer a petition without plea or objection of sufficiency, who should go to trial on the petition and the issues thereunder made, without objection, should come into this court and say that the petition which brought him into court, to which he answered, and on which a verdict was entered, without objection or exception, was not sufficient, because, forsooth, it failed to aver a negative.

No argument has been adduced in support of this novel proposition, that a plaintiff in execution must affirmatively aver, when he garnishees a debtor of his debtor, that the property in the hands of the debtor is property liable to execution, and property not exempted from execution under any statute which the defendant in execution can claim the advantage of.

The sixth and seventh assignment of errors in the brief we have sufficiently discussed.

The eighth and ninth are to the effect that the judgment on the face is erroneous, in the allowance of interest, both as to amount and manner of computation.

The judge charged the jury that interest was due and as to the date from which thay were to find interest due from the defendant. This is shown from the plaintiff's motion for a new trial. (R. p. 45.) There must have been evidence before the jury to justify the Court to do so. The plaintiff was satisfied with that charge at the time it was made because no exception was taken, nor objection made.

Non constat but that on the traverse to the answer, it was shown that such was the stipulated date of payment and that the statement in the answer that the admitted indebtednes was due monthly, was false. *Non constat* but that such an application of the interest was an error in favor of the company and against Judah Hart, and that conceding the statement in the answer to be true, the computation of the interest from the date of each

monthly instalment would have reached a larger sum than the computation of interest from the middle of the year. This would clearly be the case if the instalments due in the first six months of the year were large, and the last six months small.

There is no basis in the record for any assignment of error on this point.

We hope that your Honors will punish this plaintiff in error by damages against him for a frivolous appeal, because it is manifest that this writ was taken solely for delay and not with any bona fide purpose of resisting a demand not due, or of obtaining the ratification of any legal wrong done to it in the lower court.

Respectfully submitted,

E. HOWARD McCALEB,

E. H. FARRAR,

Attorneys.

APPENDIX.

Act of Compromise Between the City of New Orleans and Judah Hart.

United States of America,
State of Louisiana,
Parish of Orleans, City of New Orleans.

Be it known, that on this nineteenth day of the month of January, in the year of our Lord, one thousand eight hundred and eighty-five, and of the Independence of the United States of America, the one hundred and ninth, before me, Joseph Dewey Taylor, a Notary Public, in and for the Parish of Orleans, State of Louisiana, duly commissioned and qualified, and Official Notary of the City of New Orleans, and in the presence of the witnesses hereinafter named and undersigned, *personally came and appeared:*

The Honorable Joseph Valsin Guillotte, Mayor of the City of New Orleans, herein acting in his official capacity as Mayor aforesaid, being herein and hereunto specially authorized and empowered by Ordinance No. 1068, Council Series, adopted by the Council of the City of New Orleans, on the 23d day of December, A. D., 1884, a duly certified copy of which Ordinance is hereto annexed and made part hereof.

Also came and appeared, Mr. Judah Hart, a resident of the City and State of New York, now temporarily sojourning in this City, who declared unto me, Notary, that in execution of the provisions of the said Ordinance No. 1068, and in full and final compromise of suit No. 9662, of the Docket of the Circuit Court of the United States for the Eastern District of Louisiana, styled "Judah Hart vs. City of New Orleans," and of the writs of error and appeal taken from the proceedings therein had by the City of New Orleans, which said writs of error and appeal are now pending in the Supreme Court of the United States, and are therein numbered 282 and 284 upon the Docket of said Court, of the October Term of 1884, styled "City of New Orleans, plaintiff in error, vs. Judah Hart, defendant in error," they do contract, covenant and agree, as follows:

First. The said J. V. Guillotte, Mayor, binds the City of New Orleans, upon the execution of this compromise, to dismiss the writs of error and appeal taken by the City, and now pending in the Supreme Court of the United States, in said suits Nos. 282 and 284 of the Docket

of the October Term of that Court, styled "City of New Orleans, plaintiff in error, vs. Judah Hart, defendant in error."

Second. The said Judah Hart binds himself to pay, in cash, as soon as the amount can be determined, all costs incurred by the City of New Orleans in taking and prosecuting the writs of error and appeal in the two above mentioned causes and binds himself to pay the amount of said costs as soon as approved bills therefor, signed by the counsel in the case, are made and presented.

Third. The said Judah Hart hereby formally renounces all that portion of the judgment of the Circuit Court of the United States, in the said case No. 9662, of the Circuit Court of the United States, which declares the Sugar Sheds and any and all interest of the City of New Orleans in the Sugar Sheds, and in and to the revenues of said Sugar Sheds liable to seizure, and hereby releases his seizure of said Sugar Sheds, ank the interest of the City therein, made under a writ of fieri facias in said case of "Judah Hart vs. The City of New Orleans," No. 9662 of the Docket of the United States Circuit Court for the Eastern District of Louisiana, and hereby authorizes the Marshal to release and cancel the said seizure.

Fourth. The said Judah Hart hereby binds himself to enter as a credit upon his judgment in the said cause No. 9662, all amounts which have been or which may be collected under the said judgment from the Canal and Claiborne Street Railroad Company, and from the Orleans Railroad Company, under the writs of garnishment and seizure thereunder levied and to be levied.

Fifth. The said Judah Hart binds himself that, after making the above credits on the said judgment, all the balance of the sum which remains unpaid is to be funded, under the provisions of Act No. 167, of the Acts of 1884.

Sixth. It is expressly agreed and understood between the parties, that the City of New Orleans, by reason of this compromise, in no manner waives or sets aside its claim, demand or pretensions to the exemption of bonuses due and to be due by the several railroad companies within its jurisdiction, from seizure, or that the same is part of the public revenue; but, simply, grants in the particular matters comprehended in this act, to the said Judah Hart, the right to receive said said sums realized and to be realized from the Orleans Railroad Company and from the Canal and Claiborne Street Railroad Company, in part satisfaction of his said judgment.

Seventh. It is further expressly understood and agreed between

the parties, that should said Hart fail to sustain his seizure of the bonus due the City of New Orleans by the Canal and Claiborne Street Railroad Company, and that if the same shall be set aside by the Supreme Court of the United States, the said Judah Hart shall have the right, in so far as the City of New Orleans is concerned, to take such other legal course and proceedings against said Canal and Claiborne Street Railroad Company as may be necessary to realize from it the amount of bonus now under seizure, and to apply the said bonus in part satisfaction of his judgment, as aforesaid; but nothing in this concession shall be construed as a guarantee on the part of the City, of the validity of the said bonus, or as a release of any of its rights to demand and receive the said bonus as against the Railroad Company, in case said Hart should fail to collect any part thereof from the said Company.

Thus done and passed in my office, in the City of New Orleans aforesaid, the day, month and year first aforesaid, in the presence of Charles G. Rebentisch and George B. Goetz, witnesses, residing in this Parish, who have signed their names with the said parties and me Notary.

Original signed:

J. V. GUILLOTTE, Mayor. JUDAH HART.

C. G. REBENTISCH. GEO. B. GOETZ.

J. D. TAYLOR, Notary Public.

A true copy of the original.

NEW ORLEANS, Jan. 21st, 1885.

{ SEAL. }

J. D. TAYLOR,
Notary Public.

15th, W.

232

340'3"

14th

265

241'8"

13½

266

241'8"

13th, W.

D. S.

Unimproved

FENCE

233.

332'1"

FENCE

Unimproved

VARIOUS WOOD PILES

WOOD COAL

WOOD COAL

267

256'6"

268

Md Av.

No. 1283.

Edmonds et al,
Com'rs of D.C.
vs.
B. & P. R.R. Co.

} p. 63.

269

Unimproved.

E. S.

Long Bridge

Unimproved

270

255'1"

FENCE

Water

Eng'r Dep't D. C.
March 6th 1885
Scale, 100' to 1

Scale, HOR: 100' = 1"
VER: 10 = 1"

0 100 200 300 400 500 Feet

Note The black lines along streets are building lines The red are curb lines

Copy

D Street South

14th Street, West.

13½ Street. West.

267

268

269

233

Water

Potomac River

Stone Yard

Balt. and Potomac RR.

Maryland Avenue

Curb Line

S.e. 267

E Street So

Street

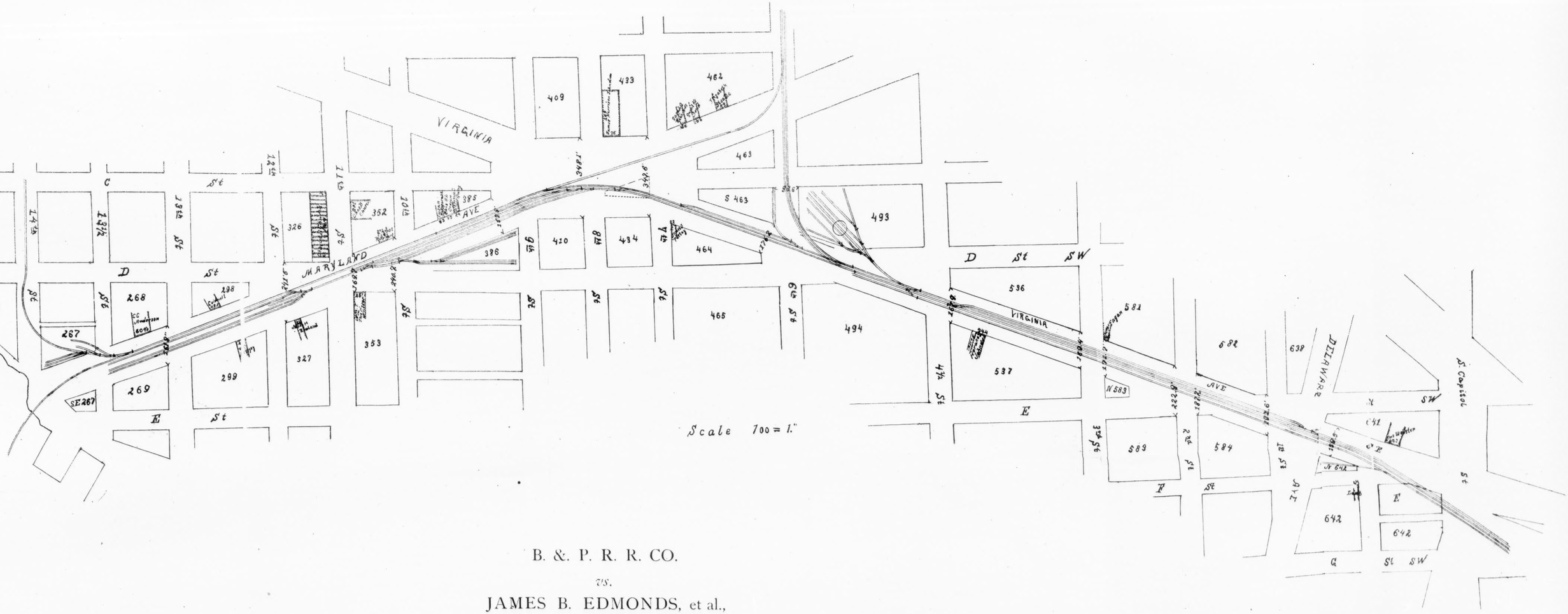
Long bridge

Scale 40

Exhibit A with original Bill

Eq. Cause No. 9262

Sup. Court, D.C.



Scale 100 = 1."

B. & P. R. R. CO.

vs.

JAMES B. EDMONDS, et al.,

Commissioners of the District of Columbia.

Map showing Intersections of Streets, &c., &c., along Maryland and Virginia Avenues, from South Capitol Street to the Potomac River.

LAKE PONTCHARTRAIN.

No. 252.
The N.O.S.F. & L. R.R. Co.
vs.
Delamore
et al. No.
} p. 194.

Light House.

Old Piling.

Yacht Club House.

Grand Stand and Promonade

Washington Bath House

L. P. Gery Professor.

J. Barbo Proprietor.

Stepping for Bathing Aboartments.

Bayou St John.

Embankment

N

W E

S

Low Water line.

Front line of Batture or Shore accretion

Pavilion.

Pic Nic Pavilion

Old Bulk Head.

Line of Stakes placed May 19th 1879.

PICNIC PAVILION'S

Pavilion

Embankment

Plan of Spanish Fort property

Showing proposed improvements in front. which are indicated by green color.

Surveyed and Stakes placed May 19th 1879.

(Signed) W. H. Bell

Civil Engineer

29 Carondelet St

New Orleans.

Columbia St.

Frankfort St.

S 90° W. 419'

Fish St.

Pond.

New York St.

Spanish Fort Hotel

Walk

New Orleans Spanish Fort & Lake Rail Road.

Gentilly St.

Rail Road Depot

Second St.

Canal

N 85° 15' W 348.1'

Mexico St.

Mexico.

First St.

Canal.

Cass St.

Bayou St. John.

Delery St.

Dublin.

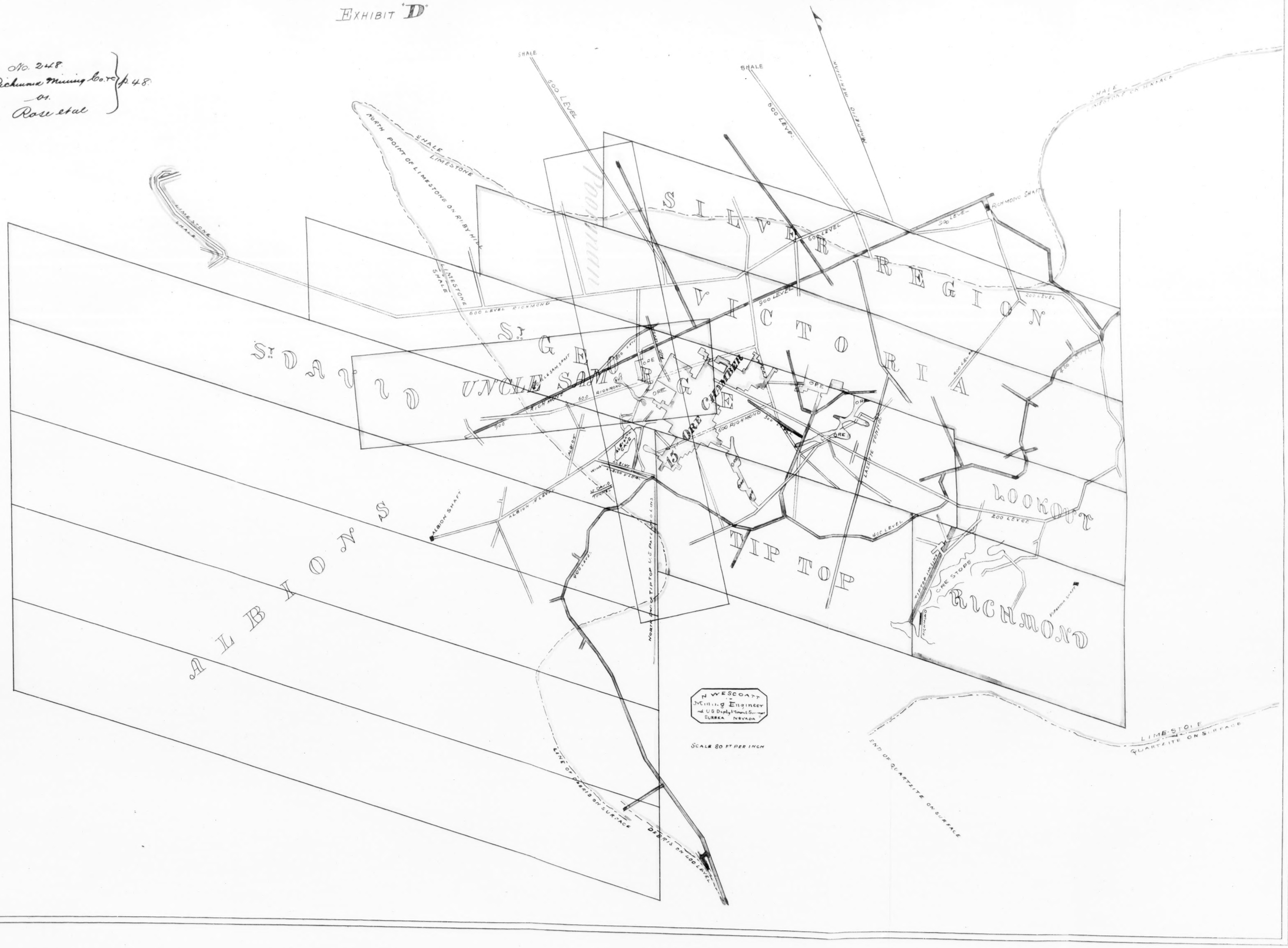
Bonnevalle St.

Edinburg Av.

Jumonville St.

EXHIBIT "D"

No. 248.
Richmond Mining Co. } p. 48.
vs.
Rose et al



No. 248.
Richmond Mining Co. } p. 49.
vs.
Rose et al.

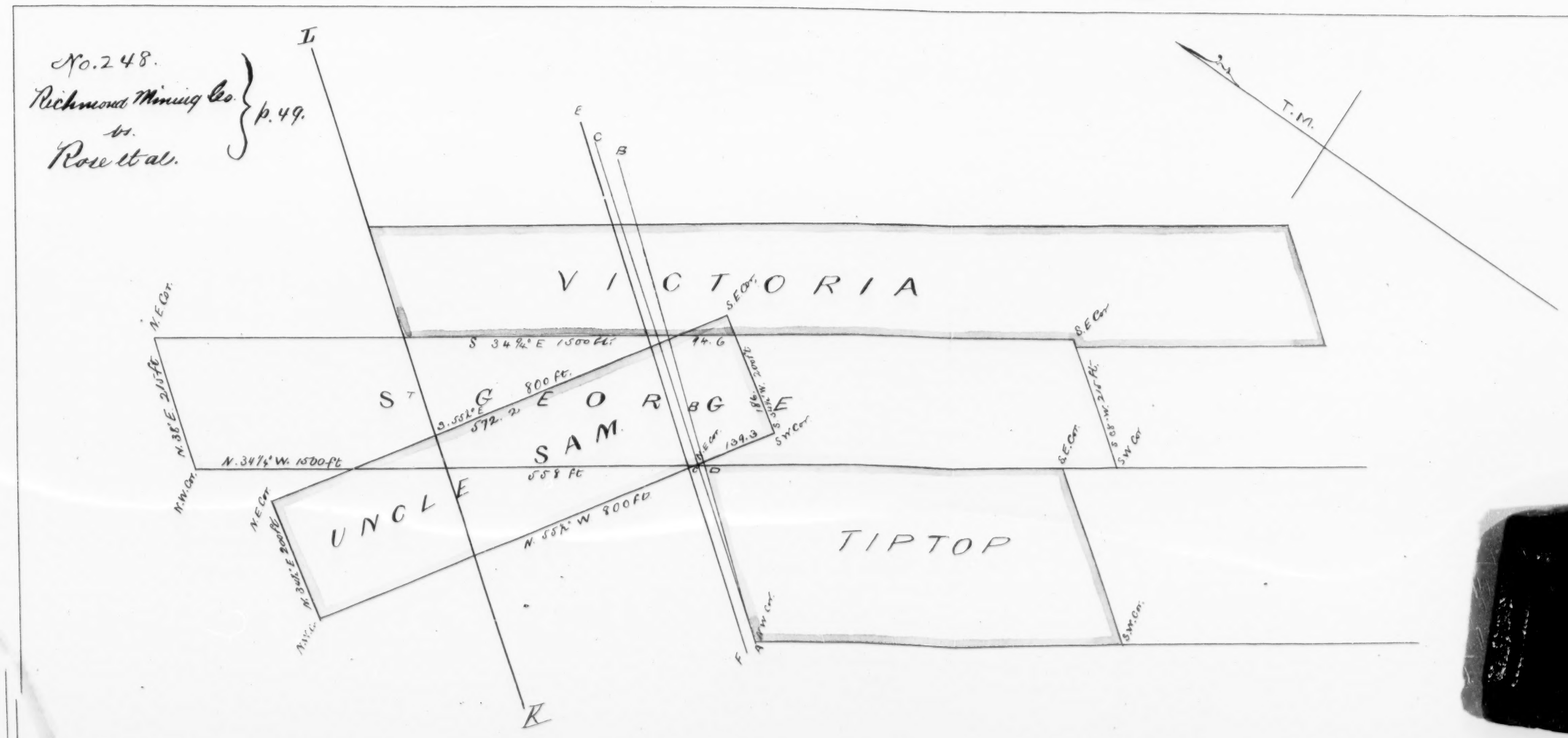


Exhibit H

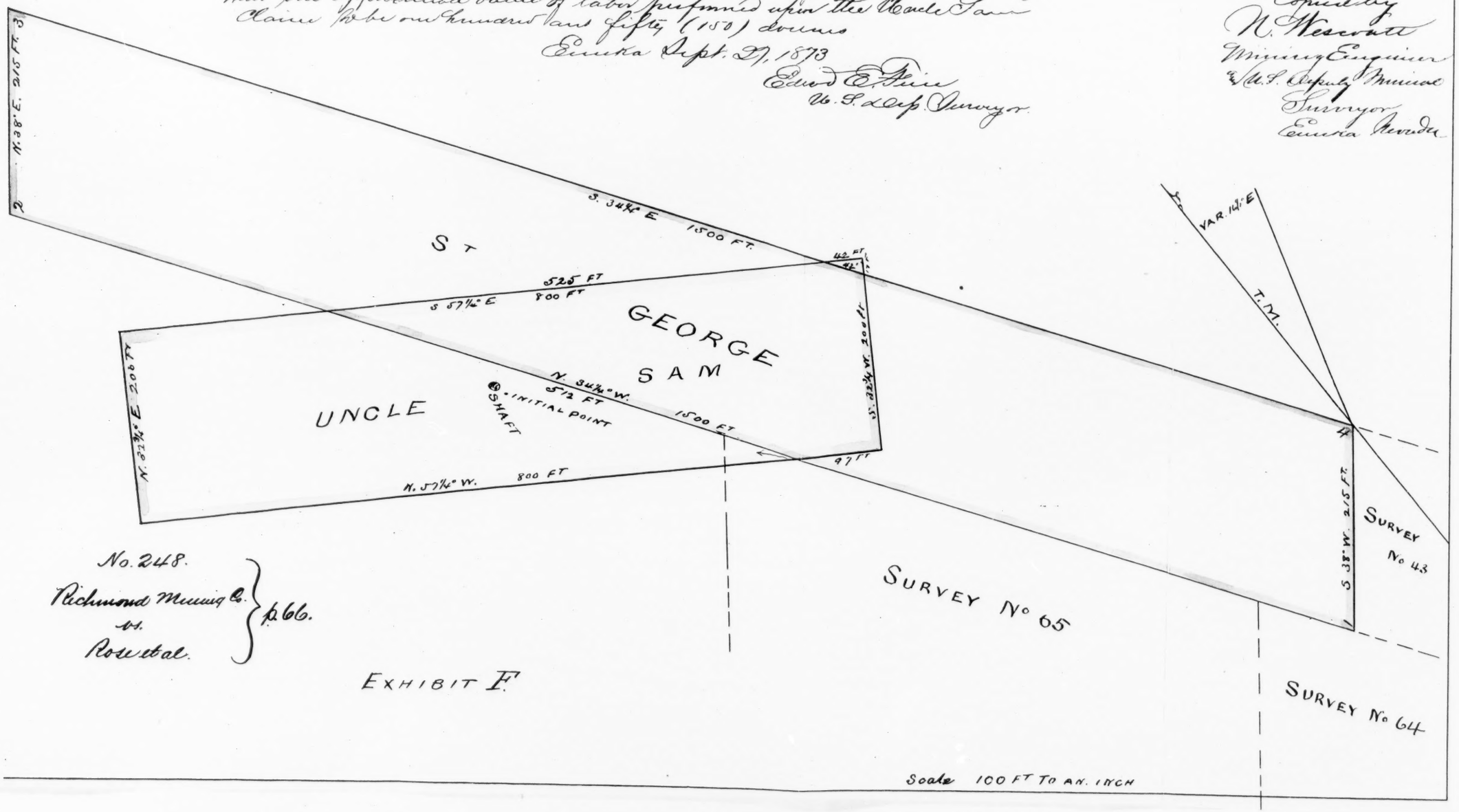
5

I, Edwd E. Pine, U. S. Deputy Mineral Surveyor for Nevada, do hereby certify the annexed diagram to be correct and made from actual Survey, and I further certify that the approximate value of labor performed upon the Uncle Sam claim to be one hundred and fifty (150) dollars

Eureka Sept. 27, 1873

Edwd E. Pine
U. S. Dep. Surveyor

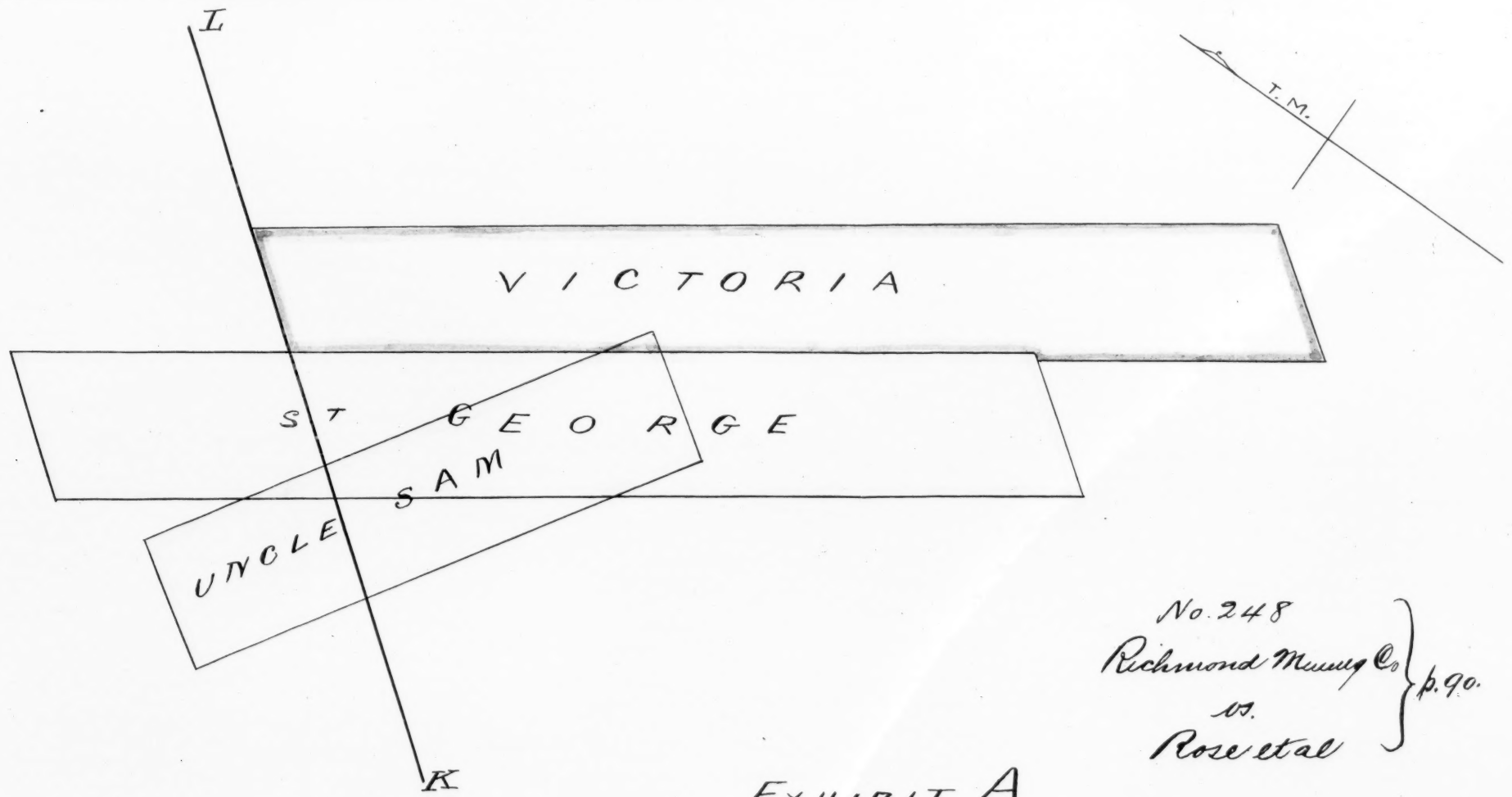
Compiled by
N. Wescott
Mining Engineer
& U. S. Deputy Mineral
Surveyor
Eureka Nevada



No. 248.
Richmond Mining Co. vs. Rosebal. } 66.

EXHIBIT F.

Scale 100 FT TO AN. INCH



No. 248
Richmond Mining Co
vs.
Rose et al
p. 90.

EXHIBIT A

Scale 200 ft to an inch